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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

**PAUL CASPARI, Superintendent,
Missouri Eastern Correctional Center,**

and

**JEREMIAH W. NIXON,
Attorney General of Missouri,**

PETITIONERS,

vs.

TERRY D. McINTYRE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the Double Jeopardy Clause's protection against a second prosecution for the same offense is violated by a defendant's conviction for stealing after his conviction for tampering where the state appellate court reasonably determined that tampering is not either the same as, or a lesser included offense of, stealing.

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OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Eighth Circuit granting the writ of habeas corpus is reported at 35 F.3d 338 (8th Cir. 1994), and is pub-

lished in the Appendix at A-1. The order of this Court remanding the cause to the Court of Appeals is published at 114 S.Ct. 375 (1993). The previous panel opinion of the United States Court of Appeals granting the writ of habeas corpus is reported at 975 F.2d 437 (8th Cir. 1992), and is published in the Appendix at A-17. The order of this Court remanding the cause to the Court of Appeals is published at 112 S.Ct. 1658 (1992). The first panel opinion of the United States Court of Appeals granting the writ of habeas corpus is reported at 938 F.2d 899 (8th Cir. 1991), and is published in the Appendix at A-31. The order sustaining and adopting the magistrate's report and recommendation is not reported, but is included in the Appendix (A-73). The magistrate's report and recommendation is not published, but is included in the Appendix (A-61). The earlier orders of the district court and the magistrate are also unpublished, but are included in the Appendix (A-51, A-55).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on September 9, 1994 (A-1). The petition for rehearing or rehearing *en banc* was denied by the Court of Appeals on November 23, 1994 (A-88). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rules 13.01 and 13.4, the present petition for writ of certiorari was required to be filed by petitioners within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against him, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

Section 570.030.1, RSMo 1986, provides:

> A person commits the crime of stealing if he appropriates property or services of another with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion.

Section 569.080.1(2), RSMo 1986, provides:

> A person commits the crime of tampering in the first degree if:
>
> . . .
>
> (2) He knowingly receives, possesses, sells, alters, defaces, destroys or unlawfully operates an automobile, airplane, motorcycle, motorboat or other motor-propelled vehicle without the consent of the owner thereof.

STATEMENT OF THE CASE

Respondent was found guilty by a jury of stealing a motor vehicle and was sentenced by the court as a persistent offender to a term of ten years' imprisonment to be served consecutively to an existing ten-year sentence (A-82). Section 570.030.3(3)(a), RSMo 1986. The conviction and sentence for stealing were imposed by the Circuit Court of St. Louis County, Missouri.

The circumstances surrounding respondent's crime were summarized by the Missouri Court of Appeals on respondent's direct appeal.

> On November 22, 1985, a man who identified himself as "Johnny" went to Kirkwood Mitsubishi and told salesman Steven George he wanted to test drive a Mitsubishi Galant. While George went to get the keys to a Galant demonstrator, "Johnny" was left alone to look at a Galant on the showroom floor. The showroom car had its keys in its ignition, and those keys were similar to the keys to the demonstrator Galant.
>
> After a test drive, "Johnny" returned a set of Galant keys to George who returned them to the dealership "key board." About 15 minutes later, George and another salesman discovered the demonstrator Galant was missing and the keys on the board were from the showroom Galant at which "Johnny" had been looking, not the demonstrator. Two days later, St. Louis City police offi-

cers saw the Galant, which was listed on a "hot sheet" of stolen cars. After a pursuit, police officers stopped the Galant and arrested defendant, who was driving, and a passenger. There was a set of keys in the vehicle's ignition.

Jack Schneedle, a Kirkwood police officer, prepared a photo array to show to automobile salesman George. Two of the photographs, obtained from the St. Louis Police Department, were of defendant and the passenger arrested with him; three were from the Kirkwood Police Department files. On November 27, 1985, Detective Schneedle took the five photographs to the Kirkwood Mitsubishi dealership, showed them to George, and asked him if any of the photos were of the person who was in the dealership and took a ride in the demonstrator Galant on November 22, 1985. Schneedle did not tell George anything else. George identified the photograph of defendant as "Johnny."

On December 19, 1985, defendant was charged with first degree tampering for operating the Galant in the City of St. Louis. He was found guilty by a jury on June 5, 1986, and sentenced July 11, 1986, by the court as a prior and persistent offender to ten years' imprisonment. We affirmed his tampering conviction on appeal. *State v. McIntyre*, 735 S.W.2d 111 (Mo.App.1987).

> On August 9, 1986, defendant was charged with stealing the Galant based on his alleged appropriation of it from Kirkwood Mitsubishi. His motion to dismiss the stealing charge, based on a claim of double jeopardy, was denied February 23, 1987.
>
> At defendant's trial on the stealing charge, automobile salesman George identified the photograph of defendant that he had previously identified for Detective Schneedle. George also identified defendant in court as "Johnny," the person who test drove the Galant that later was stolen. Defendant also was identified in court by the St. Louis police officer who arrested him while driving the Galant and the general manager of Kirkwood Mitsubishi. On the day of the theft, defendant approached the general manager in the dealership building and inquired about a Mitsubishi Galant on the parking lot. The manager directed defendant to the showroom floor and later saw him briefly in the new car showroom.

State v. McIntyre, 749 S.W.2d 420, 421 (Mo.App., E.D. 1988) (A-82 to A-84). After respondent's conviction and sentence, respondent appealed to the Missouri Court of Appeals. Id. He raised a double jeopardy claim before that court based on Brown v. Ohio, 432 U.S. 161 (1977); however, the Missouri Court of Appeals affirmed the conviction and sentence (A-84 to A-87).

On September 2, 1988, respondent filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 (A-90). After litigation before the district court, Magistrate David Noce filed his report and recommendation that the petition be denied (A-51). District Judge Edward L. Filippine adopted the recommendation (A-55).

On November 30, 1988, respondent filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) (A-100). The district court ordered petitioners to respond to the pleading (A-57). After further litigation, the magistrate again recommended that the petition be denied (A-61). The district court adopted the magistrate's report and recommendation (A-73). The district court denied respondent's request for a certificate of probable cause to appeal (A-75); however, the certificate was granted by the court of appeals (A-77).

On appeal before the court of appeals, petitioners asserted, *inter alia*, that review of the double jeopardy claim was barred under the retroactivity rules of Teague v. Lane, 489 U.S. 288 (1989). The court of appeals agreed that Grady v. Corbin, 495 U.S. 508 (1990), was a "new rule" under Teague, but that it fit within the first recognized exception to the Teague retroactivity doctrine (A-37 to A-43). Citing United States v. Felix, 926 F.2d 1522 (10th Cir. 1991), rev'd, 112 S.Ct. 1377 (1992), the court of appeals determined that respondent's double jeopardy claim warranted relief (A-45). Petitioners' petition for rehearing or rehearing *en banc* was denied. This Court, however, granted the petitioners' petition for writ of certiorari and remanded the cause to the court of appeals. Caspari v. McIntyre, 112 S.Ct. 1658 (1992).

On remand, the court of appeals adhered to its original conclusion. Recognizing a divergence between its analysis and that of the Court of Appeals for the Second Circuit, the Court of Appeals for the Eighth Circuit continued to adhere to its belief that double jeopardy claims fall within the first exception of the Teague retroactivity doctrine (A-20, n.9). The lower court also found that this case was not governed by this Court's opinion in United States v. Felix, 112 S.Ct. 1377 (1992) (A-22, A-29). Accordingly, the Court adhered to its decision to grant the writ of habeas corpus (A-30). This Court, however, granted petitioners' petition for writ of certiorari and remanded the cause to the court of appeals for reconsideration in light of United States v. Dixon, 113 S.Ct. 2849 (1993). See Caspari v. McIntyre, 114 S.Ct. 375 (1993).

On remand, the court of appeals adhered to its previous two judgments. The appellate court recanted its previous holding that stealing and tampering are not lesser included offenses of the other under the standard of Blockburger v. United States, 284 U.S. 299 (1932) (A-5; A-7; A-7, n.2; A-15, n.7). Recognizing that the Missouri Court of Appeals had held that tampering was not a lesser included offense of stealing (A-11), the federal appellate court said that it felt that the Missouri Supreme Court would disagree with that analysis and hold that first-degree tampering was a lesser included offense of stealing (A-14). Accordingly, under the Blockburger "same-elements" test, the federal court of appeals found that respondent's double jeopardy rights were violated by the prosecution for stealing after the prosecution for tampering (A-15). According, the court adhered to its previous two decisions to grant the writ of habeas corpus (A-16). Rehearing was denied. Rehearing *en banc* was also denied, but Circuit Judge Beam voted to rehear the case *en*

banc (A-88). A month later, the Court of Appeals denied petitioners' motion to certify a state-law question to the Supreme Court of Missouri (A-89). The present petition for writ of certiorari ensues.

ARGUMENT

Whether the Double Jeopardy Clause's protection against a second prosecution for the same offense is not violated by a defendant's conviction for stealing after his conviction for tampering where the state appellate court reasonably determined that tampering is not either the same as, or a lesser included offense of, stealing.

The lower court's opinion raises two legal issues that are worthy of this Court's exercise of discretionary review under Supreme Court Rule 10.1. First, the lower court candidly admits that it substituted its view of state law concerning lesser included offenses because it felt that the state appellate court erroneously decided state law. The federal appellate court gave *de novo* review to a state appellate court's construction of state law (A-11 to A-13). Earlier opinions from this Court have stated at least three different standards by which a state's construction of state law may be measured. Resolution of these conflicting standards is important for the accurate application of the Blockburger standard by the state and federal courts. Blockburger v. United States, 284 U.S. 299 (1932); United States v. Dixon, 113 S.Ct. 2849 (1993).

Second, the lower court erroneously interpreted this Court's decision in Brown v. Ohio, 432 U.S. 161 (1977). In Brown, this Court indicated that the Ohio legislature may define the Ohio offense of joyriding as a separate offense for each day of the automobile's use. Id. at 169 n.8. The Ohio legislature had not done so; thus, joyriding and auto theft were one offense under Ohio law. Id. at 168-69. Justice Blackmun's dissent in Brown was based on his belief that the majority misread local Ohio law. Id. at 172. Both the ma-

jority and dissent in Brown indicate that "time and space" are important to double jeopardy analysis to the extent provided by the local law. Local jurisdictions are free to create two offenses from one act. See Missouri v. Hunter, 459 U.S. 359 (1983). States should be free to prohibit two offenses when acts occur in two different counties on two different days. The present case gives this Court the opportunity to allow local jurisdictions to enforce the criminal law as the state legislature intends. This case gives the Court the opportunity to allow the Missouri Court of Appeals to rely on the length of time between the offenses of stealing and tampering and to rely on the different locations of those offenses in determining that two offenses occurred (A-86 to A-87).

A. Standard of Review

In determining that the Missouri offense of first-degree tampering was a lesser included offense of the Missouri offense of stealing, the federal court of appeals expressly gave no deference to the state appellate court's determination that tampering was not a lesser included offense of stealing (A-10 to A-13). Not only is the court of appeals' analysis erroneous in and of itself, it conflicts with the three different articulations of the level of deference a federal court should give a state court's determination of state law.

This Court has presented at least three different articulations of the level of deference a federal court should give a state court's resolution of state law in connection with the federal court's resolution of a double jeopardy clause claim. Petitioners will review these articulations and then compare them to the lack of deference by the court below.

In Ohio v. Johnson, 467 U.S. 493 (1984), the Court appears to use a standard of total deference to the state court's analysis of state law.

> We accept, as we must, the Ohio Supreme Court's determination that the Ohio Legislature did not intend cumulative punishment for the two pairs of crimes involved here.

Id. at 499; see also Brown v. Ohio, 431 U.S. 161, 169 n.8 (appearing to apply absolute deference to state court's construction of state law).

In comparison to the "total deference" standard, the Court has also used language that can best be described as providing "substantial" deference, but not "total" deference to the state court's resolution of state law. This language is contained in this Court's opinion in Ricketts v. Adamson, 483 U.S. 1 (1987).

> We will not second-guess the Arizona Supreme Court's construction of the language of the plea agreement. While we assess independently the plea agreement's effect on respondent's double jeopardy rights, the construction of the plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law, and we will not disturb the Arizona Supreme Court's reasonable disposition of those issues.

Id. at 5 n.3. The Court continued:

> As noted previously, once a state court has, within broad brounds of reasonableness, determined that a breach of a plea agreement results in certain consequences, a federal habeas court must independently assess the effect of those consequences on federal constitutional rights. This independent assessment, however, proceeds without second-guessing the finding of a breach and is not a license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation.

Id. at 5 n.3. Although the dissent in Ricketts indicated that "deference" to the state supreme court's construction of the plea agreement was appropriate, id. at 13 n.1 (Brennan, J., dissenting), the majority opinion questioned the lack of explanation of "the nature of the deference [the dissent] purports to afford the state courts." Id. at 5 n.3. See also Mullaney v. Wilbur, 421 U.S. 684, 691 n.11 (1975) (absolute deference unless state-court interpretation of state law is "obvious subterfuge to evade consideration of a federal issue").

Finally, in United States v. Dixon, 113 S.Ct. 2849 (1993), in connection with the Blockburger analysis, Justice Scalia wrote in terms of deference if there is "sound support in the text of the statute."

> We accept, as we ordinarily do, the construction of a District of Columbia law adopted by the District of Columbia Court of Appeals. . . . The construction here has sound support in the text of the statute.

Id. at 2858 n.6. The foregoing statements by this Court were made in the context of resolving double jeopardy claims on direct appeal and, in the Ricketts case, in a habeas corpus case.

Petitioners would further note that in situations involving habeas corpus review under 28 U.S.C. § 2254, this Court has made clear--indeed, crystal clear--that a federal habeas corpus court has no authority but to accept a state court's interpretation of state law.

> In ruling that McGuire's due process rights were violated by the admission of the evidence, the court of appeals relied in part on its conclusion that the evidence was "incorrectly admitted . . . pursuant to California law." Id. at 754. Such an inquiry, however, is no part of a federal court's habeas review of a state conviction. We have stated many times that "federal habeas corpus relief does not lie for errors of state law." Lewis v. Jeffers, 497 U.S. ___, ___, 110 S.Ct. 3092, 3102, 111 L.Ed.2d 606 (1990); see also Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 874-75, 79 L.Ed.2d 29 (1984). Indeed, we reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States. 28 U.S.C. § 2241; Rose v. Hodges, 423 U.S.

19, 21, 96 S.Ct. 175, 177, 46 L.Ed.2d 162 (1975) (per curiam).

Estelle v. McGuire, 112 S.Ct. 475, 480 (1991). The policies supporting the "absolute deference" standard are stronger in the context of collateral review of a state criminal conviction.

During respondent's direct appeal, the Missouri court of appeals determined, as a matter of state law, that tampering was not a lesser included offense of stealing. State v. McIntyre, 749 S.W.2d 420, 422 (Mo.App., E.D. 1988) (A-85). Applying the federal law of double jeopardy to this determination of state law, Ricketts v. Adamson, *supra* at 5 n.3, respondent's rights under the Double Jeopardy Clause were not violated. The court below criticized the Missouri court of appeals' resolution of state law (A-12). Notwithstanding this criticism, the fact remains that in habeas matters, the federal court should accept a state court's interpretation of state law. Estelle v. McGuire, 112 S.Ct. at 480; Ohio v. Johnson, 467 U.S. at 499. Principles of comity require the federal courts to defer to the state court's interpretation of state law. The opinion below, on the other hand, reads like a state appellate-court opinion criticizing a sister appellate court's interpretation of a state statute (A-12). This is not the role contemplated by Congress of a federal habeas court.

How does the court below avoid these basic principles of comity? First, the court below stated: "[F]ederal courts are not required to follow the state case if the construction would have an unconstitutional effect on the defendant" (A-14). This statement, however, is outcome-determinative. The statement says that if a defendant's constitutional rights are violated, then the federal court is not obligated to follow the state court's interpretation of state law. Of course, that

analysis is rejected by this Court in Estelle and is inconsistent with this Court's language in Johnson. This analysis would allow the federal court to look at the putative constitutional violation in deciding whether to follow the state law. To the contrary, petitioners submit that under classic double jeopardy clause analysis, a court looks first to the state law of lesser included offenses. Once the state court determines that tampering is not a lesser included offense of stealing, then the conclusion that respondent's double jeopardy rights were not violated naturally follows. Once there is the required deference to the state court's interpretation of state law, there is no "unconstitutional effect."

The lower court's citation of Cokeley v. Lockhart, 951 F.2d 916, 917 (8th Cir. 1991), *cert. denied*, 113 S.Ct. 296 (1992), is for the proposition of *de novo* review of constitutional issues (A-14). For the purposes of this petition, petitioners will assume that the court below was correct in determining that *de novo* review of a federal constitutional issue is appropriate even though this Court has not dispositively resolved that question. See Wright v. West, 112 S.Ct. 2482 (1992). Whatever the merit the proposition of *de novo* review of constitutional issues may have, it is not disputed by petitioners in the present case. What is disputed is the fact that *de novo* review should occur only for federal law, not state law.

The court below also seems to federalize the state-law issue of lesser included offenses. The lower court described--as a double jeopardy issue--the issue of whether first-degree tampering is a lesser included offense of stealing as an issue of federal law (A-14). Petitioners note that there is no citation for the proposition that the law of "lesser included offenses" is somehow an issue of federal constitution-

al law. A state-law/federal-law dichotomy concerning lesser included offenses would create the effect of an offense's being a lesser included offense for some purposes and not a lesser included offense for other purposes.

The federal congress has not authorized the federal courts to become super state supreme courts. See, e.g., Estelle v. McGuire, 112 S.Ct. at 481, quoting Spencer v. Texas, 385 U.S. 554, 563-64 (1967). Once a state court resolves state law, then, perhaps, there is *de novo* review of the federal constitutional issue by the federal courts. Proper *de novo* review, giving deference to the state-law issue of lesser included offenses, requires a finding that respondent's constitutional rights were not violated.

On the other hand, assuming review under either the Ricketts standard or the Dixon standard, respondent's double jeopardy clause rights were not violated. The state court's determination that first-degree tampering is not a lesser included offense of stealing is within the broad boundaries of reasonableness and has "sound support in the text of the statute." At the time of respondent's offenses, November, 1985, first-degree tampering was not a lesser included offense of stealing.

The court below criticized the state appellate court in respondent's direct appeal for its reliance on State v. Smith, 655 S.W.2d 626 (Mo.App., W.D. 1983), in determining that tampering was not a lesser included offense of theft (A-11, citing State v. McIntyre, 749 S.W.2d at 422, citing State v. Smith, *supra*). The federal court reasoned that Smith involved second-degree tampering, not the issue of whether first-degree tampering was a lesser included offense of stealing (A-11). The federal court's construction of state law is

in error. Smith involved the construction of the 1981 second-degree tampering statute. At the time of that defendant's offense, 1981, the offense of second-degree tampering included what was first-degree tampering at the time of respondent's offense, 1985. To put it another way, between Smith's offense and respondent's offense, the statutes changed, upgrading much of the conduct prohibited by the earlier second-degree tampering to first-degree tampering. 1982 Laws of Missouri 691. Accordingly, not only was it reasonable for the state appellate court to rely on Smith, it was also the right thing to do.

At the time of Smith's crime, July, 1981, State v. Smith, 655 S.W.2d at 627, first-degree tampering had nothing to do with the unlawful operation of an automobile. See § 569.080.1, RSMo 1978. To the contrary, that conduct was prohibited by second-degree tampering.

> A person commits the crime of tampering in the second degree if he:
>
> (1) tampers with property of another for the purpose of causing substantial inconvenience to that person or to another; or
>
> (2) unlawfully operates or rides in or upon another's automobile, airplane, motorcycle, motorboat or other motor-propelled vehicle; . . . .

Section 569.090.1, RSMo 1978, quoted in State v. Smith, 655 S.W.2d at 627. In 1982, the Missouri legislature expanded first-degree tampering to include the following:

> A person commits the crime of tampering in the first degree if:
>
> . . .
>
> (2) he knowingly receives, possesses, sells, alters, defaces, destroys or unlawfully operates an automobile, airplane, motorcycle, motorboat or other motor-propelled vehicle without the consent of the owner thereof.

Section 569.080.1(2), quoted in 1982 Laws of Missouri 691.

The Smith court, in determining that tampering was not a lesser included offense of stealing, listed the statutory elements of stealing, State v. Smith, 655 S.W.2d at 627, and the statutory elements of second-degree tampering as they were in effect in 1981. State v. Smith, 655 S.W.2d at 627-28. After comparing the elements, the court concluded that then second-degree tampering was not a lesser included offense of stealing.

> Comparing the legal and factual elements of stealing and tampering in the second degree, it is apparent that they differ in that stealing requires appropriation of property with the purpose to deprive the owner of the property or to restore the property only on payment or reward or to use the property so that the recovery by the

> owner is unlikely. In short, stealing requires an intent to deprive the owner permanently of the property unless it is held for reward. On the other hand, the intent in tampering is only to deprive the owner of the property temporarily.
>
> It is apparent that the intent required to prove stealing differs substantially from the intent required to prove tampering in the second degree. For that reason, tampering in the second degree cannot be a lesser included offense of stealing.

State v. Smith, 655 S.W.2d at 628. In light of the expansion of the first-degree tampering statute in 1982, the McIntyre state appellate court acted reasonably in relying upon the construction of the previous statute in Smith.

There is a second reason the state court's decision is reasonable: Tampering and stealing have different elements in their verbs. Respondent's first trial was for first-degree tampering in the Circuit Court of the City of St. Louis. The jury received an instruction as to the elements of that offense:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on November 24, 1985, in the City of St. Louis, State of Missouri, that defendant knowingly operated a certain automobile, a 1986 Mitsubishi Galant, owned by Kirkwood Mitsubishi, and

> Second, that he operated the automobile without the consent of the owner, and
>
> Third, that he operated knowing that he did so without the consent of the owner,
>
> then you will find the defendant guilty of tampering in the first degree.

(A-106). At the second trial, in the Circuit Court of St. Louis County, the jury received a stealing instruction containing the following language:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about November 22, 1985, in the County of St. Louis, State of Missouri, the defendant took a 1986 Mitsubishi automobile, property owned by Kirkwood Mitsubishi, and
>
> Second, that defendant did so without the consent of Kirkwood Mitsubishi, and
>
> Third, that defendant did so for the purpose of withholding it from the owner permanently, and
>
> Fourth, that the property taken was an automobile,

> then you will find the defendant guilty of felony stealing.

(A-110-111). The elements of tampering are not a subset of the elements of stealing. The putative lesser offense of tampering requires the finding of an element that is not required for a conviction for stealing.

Petitioners refer the Court to the verbs. A conviction for tampering requires the defendant to "operate an automobile." A conviction for stealing, however, does not require "operation" of the vehicle. The conviction for stealing, as instructed, required that the defendant "took" an automobile. Since a conviction for tampering requires an element (operation) that is not required for the conviction of the putative greater offense of stealing (taking), tampering is not a lesser offense of stealing. Schmuck v. United States, 489 U.S. 705, 716 (1989). The federal court below performed no analysis concerning the verbs submitted to the jury (A-15).

The state court of appeals in State v. Davis, 849 S.W.2d 34 (Mo.App., W.D. 1993), recently considered the issue of whether conviction for first-degree tampering and second-degree robbery were improper under the Double Jeopardy Clause. Recalling that second-degree robbery occurs when a person "forcibly steals property," § 569.030, RSMo 1986, the Missouri Court of Appeals found that first-degree tampering included an element that was not included in second-degree robbery.

> The movement of the motor vehicle that constituted tampering by the definition of offense charged was the operation of the motor vehicle. The term "operation" as used

> in § 569.080.1(2) is not defined by statute. It has been understood by judicial opinion to include the act of "driving." State v. Greer, 783 S.W.2d 527 (Mo.App. 1990); State v. McIntyre, 735 S.W.2d 111 (Mo.App. 1987). That was the nature of the submission and of the proof of tampering upon which the conviction and sentence of the offense rests. The asportation for robbery and driving for tampering was at most a fleeting coincidence of "same conduct" and without significance to either subsection (3) of § 566.041 or the rule of double jeopardy. There was no impediment to the lawful cumulative punishment for convictions of robbery in the second degree and tampering.

Id. at 44. The act of "operation" or "driving" of the vehicle is an element of first-degree tampering that is not required for conviction of stealing. Of course, the federal court of appeals might state that the Missouri Court of Appeals for the Western District, the court deciding Davis, erroneously decided that the elements were different--just like the state Court of Appeals for the Eastern District in respondent's direct appeal. That form of analysis rings hollow where two of the three regional state courts of appeal have determined that the elements of the state-created offenses are different. Indeed, to the contrary, the federal court below cites no Missouri appellate-court decision stating that first-degree tampering is a lesser offense of stealing.

Respondent's argument before the lower court was that stealing required an "appropriation," § 570.030.1, RSMo 1986, that "to appropriate" meant "to take, obtain, use, trans-

fer, conceal or retain possession of," and that first-degree tampering required a defendant to "operate" an automobile. Whether a violation of the Double Jeopardy Clause occurs with a conviction for first-degree tampering followed by stealing through "use" of property of another is a hypothetical that need not be answered since respondent was charged with, and convicted of, theft by "taking." The State did not charge, try, convict or sentence respondent in a way that respondent argues would have violated his double jeopardy rights.

As the state courts have made clear, the mental state and the verbs involved with the offenses of stealing and first-degree tampering are different. The state courts have determined, within reasonable boundaries, that first-degree tampering is not a lesser included offense of stealing.

The Court's choice of standard of review: (1) total deference, (2) reasonable boundaries or (3) sound support in the text of the statute is an important choice due to the interest of comity between the federal and state systems. Each of these standards is different than that selected by the federal court of appeals--that, of course, being *de novo* review of the state-law issue. Under whichever standard eventually selected by this Court as being the proper standard of deference to a state court's construction of state law, petitioners believe the appropriate conclusion is that rendered by the state courts, that first-degree tampering is not a lesser included offense of stealing.

Time and Space

The first conviction--tampering--was due to petitioner's operation of a vehicle in St. Louis City on November 24,

1985. The second conviction--stealing--was due to petitioner's taking an automobile in St. Louis County on November 22, 1985. The court below states the position that the fact that the crimes occurred on different days and in different jurisdictions is insignificant. This contention is erroneous.

The sole source of support for the court's position was Brown v. Ohio, 432 U.S. 151, 169 (1977) (A-13). Of course, the Supreme Court's decision was based on its reading of Ohio law. Id. at 168 (agreeing with the Ohio Court of Appeals that joyriding and auto theft were one offense under Ohio law); id. at 169 n.8 (indicating that Ohio legislature may define joyriding as a separate offense for each day of the automobile's use). Justice Blackmun's dissent is based on his belief that the majority misread local Ohio law. Id. at 172. Both the majority and dissent in Brown indicate that "time and space" are important to double jeopardy analysis only to the extent local law provides. Local jurisdictions are allowed to create two offenses from one act. See Missouri v. Hunter, 459 U.S. 359 (1983). When the Missouri Court of Appeals relied on the length of time between the offenses in determining there were two offenses, the state court was acting well within its prerogative given to it by this Court.

This type of analysis is confirmed by the court in United States v. Maza, 983 F.2d 1004, 1012 (11th Cir. 1993).

> In Brown, the court said that the government may not, under the Constitution, endlessly "divide a single crime into a series of temporal or spatial units," bringing each as a separate prosecution. . . . This statement must refer to the factual content of "single

> crime" not merely its statutory elements. To read Brown otherwise would have two negative effects. First, the rule would immunize a defendant from future prosecution if he commits the same crime again, whether prosecuted as a greater or lesser offense. Second, it would impose a rule of compulsory joinder on the government that . . . would be unwieldy and unrealistic.

Accordingly, that court looked at time, space and other factors to determine if the defendant committed two crimes. See United States v. Long, 952 F.2d 1520, 1532 (8th Cir. 1991). If the federal courts look to time and space in determining that there are two crimes, state courts should be allowed to do the same. The Missouri Court of Appeals properly looked to the fact that the offenses occurred on different days and in different counties in finding there were two crimes. Of course, in this situation, the elements of stealing and first-degree tampering are different since the offenses involve different counties and different dates.

The California court in People v. Malamut, 93 Cal. Rptr. 782 (1971), recognized the importance of time and space. In Malamut, the defendant was convicted of both theft and driving without the consent of the owner. In Malamut, 62 days passed between the theft of the automobile and the occasion when the defendant was driving without consent. The court found significant the lapse of time and the fact that the defendant was not engaged in one continuous journey away from the site of the theft. Another factor the court found significant was the fact that the defendant was driving in a different location with a different purpose than the theft. The signifcance of time and space in determining

whether there are two offenses is exemplified in the Malamut decision.

The foregoing illustrates that time and space should matter in double jeopardy analysis. The Missouri Court of Appeals correctly determined that since the offenses for tampering and stealing occurred two days apart and in two locations--St. Louis City and St. Louis County--respondent could be prosecuted for the two different offenses. This is not a situation, as found by the Missouri Court of Appeals, where one act was being divided artificially into two separate offenses, a situation the state court would not condone. Rather, two separate offenses occurred in two different locations and at two different times. Accordingly, respondent was not prosecuted twice for the same offense, in violation of the Double Jeopardy Clause.

CONCLUSION

For the foregoing reasons, petitioners pray the Court issue a writ of certiorari and summarily reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2700

Terry D. McIntyre,	*	
	*	
Plaintiff - Appellant,	*	Appeal from the
	*	United States
v.	*	District Court for
	*	the Eastern District
Paul Caspari,*	*	of Missouri.
	*	
Defendant - Appellee.	*	

Submitted: March 7, 1994

Filed: September 9, 1994

Before McMILLIAN, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

JOHN R. GIBSON, Senior Circuit Judge.

*Paul Caspari succeeded Myrna Trickey as superintendent of the Missouri Eastern Correctional Center during the pendency of this appeal. Accordingly, we substitute Paul Caspari for Myrna Trickey. See Fed. R. Civ. P. 25(d).

Terry D. McIntyre's habeas petition raising a most troublesome double jeopardy issue is before us for the third time, after our second opinion in this case was vacated by the United States Supreme Court. The issue before us is a narrow one, whether Blockburger v. United States, 284 U.S. 299 (1932), bars McIntyre's conviction for stealing after he was convicted of tampering in the first degree. On November 22, 1985, McIntyre took a car from a dealership in Kirkwood, Missouri. Two days later, on November 24, 1985, he was arrested in the city of St. Louis while driving the same car. In June 1986, McIntyre was prosecuted, tried and found guilty in the city of St. Louis, Missouri, of first-degree tampering with an automobile owned by a car dealership in St. Louis County, Missouri. In February 1987, a circuit court in St. Louis County convicted McIntyre of stealing that same vehicle. He was sentenced to two consecutive ten-year terms in prison. We conclude that McIntyre's two prosecutions violate the Blockburger test. Accordingly, we reverse and order the district court to grant the writ of habeas corpus, ordering that McIntyre's stealing conviction be vacated.

McIntyre appealed his stealing and tampering convictions, claiming the State's prosecution for stealing after he was already convicted of tampering violated his Fifth Amendment right against double jeopardy. The Missouri Court of Appeals affirmed his convictions. See State v. McIntyre, 735 S.W.2d 111 (Mo. Ct. App. 1987) (first-degree tampering conviction); State v. McIntyre, 749 S.W.2d 420, 422 (Mo. Ct. App. 1988) (stealing conviction). Thereafter, McIntyre filed a petition for writ of habeas corpus in the

district court based on his double jeopardy claim.[1] The district court denied McIntyre's petition and adopted the magistrate judge's recommendation that first-degree tampering is not a lesser included offense of stealing under Missouri law. Order of Nov. 22, 1988, slip op. at 1. McIntyre appealed, and we granted the writ of habeas corpus. McIntyre v. Trickey, 938 F.2d 899 (8th Cir. 1991) (McIntyre I). We held that McIntyre's Fifth Amendment right against double jeopardy was violated when the State prosecuted him for stealing an automobile when he had earlier been prosecuted for first-degree tampering with the same car. Id. at 905-07. We based our decision on Grady v. Corbin, 495 U.S. 508 (1990), which held that the Double Jeopardy Clause blocks a subsequent prosecution if the government must prove, as an essential element of the offense, conduct that constitutes an offense for which defendant has already been prosecuted. Id. at 521.

After the State filed a petition for writ of certiorari, the United States Supreme Court vacated our decision and remanded with directions to reconsider in light of United States v. Felix, 112 S. Ct. 1377 (1992). In Felix, the Supreme Court modified the Grady rule, and held that subsequent prosecutions for crimes involving "multilayered conduct as to time and place" may not be barred. Id. at 1385. After reconsideration, we affirmed our prior decision, McIntyre v. Trickey, 975 F.2d 437 (8th Cir. 1992) (McIntyre II), and held that McIntyre's crime was a single course of conduct. We reasoned that first-degree tampering was a

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[1]The State of Missouri previously admitted that McIntyre had exhausted his state remedies. See McIntyre v. Trickey, 938 F.2d 899, 900-01 (8th Cir. 1991).

"species of lesser included offense" under Felix and therefore McIntyre's prosecution for stealing violated his Fifth Amendment right against double jeopardy. Id. at 443 (citing Felix, 112 S. Ct. at 1384). Thereafter, the State again petitioned for writ of certiorari. The Supreme Court vacated our judgment in McIntyre II with directions to reconsider in light of United States v. Dixon, 113 S. Ct. 2849, 2864 (1993), which overruled Grady. The parties submitted letter briefs at our request, and we have heard argument.

The Double Jeopardy Clause prohibits a second prosecution for the same offense. See U.S. Const. amend. V. Critical to the determination of whether the two prosecutions are for the "same offense" is whether the two offenses consist of the same elements. The Supreme Court first articulated the "same-elements" test in Blockburger v. United States, 284 U.S. 299, 304 (1932), which held that the focus should be "on whether each offense requires proof of a fact that the other does not." Id. (emphasis added); see United States v. Cerone, 830 F.2d 938, 944 (8th Cir. 1987), cert. denied, 486 U.S. 1006 (1988). In Grady, the Supreme Court held that a "same-conduct" test should be considered in addition to the same-elements test. 495 U.S. at 521. Under the same-conduct analysis, the Double Jeopardy Clause barred any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. Id. However, in Dixon, the Supreme Court concluded that the same-conduct test was unworkable and specifically overruled it. 113 S. Ct. at 2864. Therefore, the Supreme Court has made clear that the Blockburger "same-elements" test is the sole standard by which we must determine whether a subsequent prosecution violates the Double Jeopardy Clause.

Id.; United States v. Rodgers, 18 F.3d 1425, 1428 (8th Cir. 1994).

Much of the supplemental briefing and argument before us has revolved around language in McIntyre I and McIntyre II. Both of these opinions have been vacated by the Supreme Court orders granting certiorari, and remanded to us for further consideration in light of the developing Supreme Court law. Accordingly, our earlier opinions no longer have any precedential value. If we glean any reasoning that is material to the issues before us, it may be considered only as we analyze the double jeopardy issue under Blockburger. It is also true that our earlier two decisions primarily involved a discussion of Grady, and an application of the Grady same-conduct standard under the restrictions placed upon it by Felix. As Dixon overruled Grady, most of our discussion is robbed of any materiality to the "same-elements" analysis we must now undertake.

In McIntyre I we discussed the elements of the two offenses as follows:

> The testimony regarding the visit to the car dealership, together with the testimony concerning McIntyre's operation of the car, proved the entirety of the tampering offense, and nearly the entirety of the stealing offense. The only new witness presented by the government at the stealing trial was Detective Schneedle, who testified regarding the photographic lineup and George's identification of McIntyre. Even accepting that this testimony was necessary to help establish the first element of the stealing

> charge, the conduct proved at the first trial established the whole of the next two elements--the owner's lack of consent and McIntyre's purpose of withholding the car permanently from the owner.
>
> Therefore, we conclude that McIntyre's second prosecution violated the rule of Grady because the government, to establish essential elements of the stealing charge, proved conduct that constituted an offense for which McIntyre had already been prosecuted. See Grady, 110 S. Ct. at 2093.

938 F.2d at 906.

In McIntyre II we referred to this discussion and stated:

> In the stealing trial, the government proved the same conduct it had proved to establish the entirety of the tampering offense; significantly, it proved that conduct to establish nearly the entirety of the stealing charge. McIntyre, 938 F.2d at 906. This was not a situation involving a 'mere overlap' in proof. See Felix, ___ U.S. at ___, 112 S. Ct. at 1382 ("a mere overlap in proof between two prosecutions does not establish a double jeopardy violation"). The same conduct was proved at both trials to establish charges that were nearly identical.

975 F.2d at 443-44. However, in McIntyre II we also stated:

"Neither one of these offenses is a lesser-included offense of the other under the Blockburger standard, for each requires proof of an element that the other does not." Id. at 443 (citing Blockburger, 284 U.S. at 304).

While in McIntyre I we spoke of conduct, we also referred to "nearly the entirety of the stealing charge" and distinctly compared the essential elements of the two charges. 938 F.2d at 906. After intervening study and argument, it is evident that these two statements are merely an application of the same-conduct test. As the Supreme Court has vacated our opinion containing these passages, and has directed that we consider the case in light of the Dixon opinion, we need only examine the double jeopardy issue under the principles announced in Blockburger.

As McIntyre argues, Brown v. Ohio, 432 U.S. 151 (1977), is instructive.[2] In Brown, the defendant was

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[2]In McIntyre II, 975 F.2d at 442 n.3, we stated Brown did not control because tampering was not a lesser included offense of stealing. We are convinced on further study that we spoke too hastily, and that we were wrong. We relied on a decision of the Missouri appellate court, State v. Rivers, 663 S.W.2d 255, 256 (Mo. Ct. App. 1983), just as the Missouri Court of Appeals did in considering McIntyre's appeal from his stealing conviction. See McIntyre, 749 S.W.2d at 422. In McIntyre's earlier appeals to this court, we directed our attention to the Grady issues, and it is apparent that we did not analyze with proper care the elements of first-degree tampering and stealing under the Missouri statutes. Rivers and the other cases the Missouri Court of Appeals relied on dealt with second-degree

convicted for joyriding an automobile under Ohio law and was later prosecuted for stealing the same automobile. Id. at 162. Applying Blockburger, the Supreme Court held that the prosecution for stealing violated the Double Jeopardy Clause because each of the two crimes did not require proof of an additional fact that the other did not. Brown, 432 U.S. at 168. The Court held that joyriding an automobile was a lesser included offense of stealing an automobile because joyriding requires no proof beyond that which is required for a conviction of stealing. In addition, the Supreme Court rejected the Ohio courts' conclusion that no double jeopardy problem existed because the joyriding offense and stealing occurred on different days. "[T]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Id. at 169. Here, too, we reject the State's argument that the offenses of tampering and stealing are different offenses merely because they occurred on separate days.

We are mindful that in determining that the defendant was unconstitutionally subjected to double jeopardy, Brown emphasized that the Ohio courts had previously determined that joyriding was a lesser included offense of stealing. In contrast, in McIntyre's case, the Missouri Court of Appeals has determined that tampering is not a lesser included offense

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tampering, and as our later analysis will demonstrate, the elements of first-degree tampering and second-degree tampering are fundamentally different. We now recognize that our earlier statement in McIntyre II, 975 F.2d at 442 n.3, that tampering was not a lesser included offense of stealing was an incorrect conclusion about Missouri law.

of stealing.[3] McIntyre argues that the Missouri Court of Appeals based the determination that first-degree tampering[4] is not a lesser included offense of stealing[5] on cases

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[3]The Missouri Supreme Court has not considered whether tampering is a lesser included offense of stealing.

[4]The Missouri first-degree tampering statute provides in relevant part:

> A person commits the crime of first-degree tampering if:
>
> . . .
>
> (2) He knowingly receives, possesses, sells, alters, defaces, destroys or unlawfully operates an automobile . . . without the consent of the owner thereof.

Mo. Rev. Stat. § 569.080 (1986 & Supp. 1993).

[5]The Missouri stealing statute provides in relevant part:

> A person commits the crime of stealing if he appropriates property . . . of another with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion.

Mo. Rev. Stat. § 570.030 (1986 & Supp. 1993). Further, the statute defines "appropriate" to mean "to take, obtain, use, transfer, conceal or retain possession of." Mo. Rev. Stat. § 570.010(2) (1986 & Supp. 1993).

considering tampering in the second degree.[6] He concedes that if he had been charged with tampering in the second degree, he would not have a viable double jeopardy claim, but contends the statute for first-degree tampering does not contain any elements not also found in the stealing statute.

After observing that state court determinations of state law issues are binding on federal courts, the Court in Brown concluded that the state court in Ohio had erred in its determination that the time gap prevented applicability of the double jeopardy bar. 432 U.S. at 167. The state court's defective analysis of the legal issue in that case caused the Supreme Court to conclude that a double jeopardy violation existed. Id. at 167-68. We face a similar situation in this case. We are required in habeas matters to accept the state courts' interpretation of state law, Wainwright v. Goode, 464 U.S. 78, 84 (1983) (per curiam), but we are not similarly

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[6]In relevant part, the Missouri statute defines tampering in the second degree as:

> 1. A person commits the crime of tamper in the second degree if he:
>
> (1) Tampers with property of another for the purpose of causing substantial inconvenience to that person or to another; or
>
> (2) Unlawfully rides in or upon another's automobile, airplane, motorcycle, motorboat or other motor-propelled vehicle.

Mo. Rev. Stat. § 569.090 (1986 & Supp. 1992).

bound as to the constitutional effect of that construction. Missouri v. Hunter, 459 U.S. 359, 368 (1983); Brown, 432 U.S. at 167. Further, as it is our duty in habeas cases to review de novo a state court's legal conclusions, we are not required to presume that a state court's conclusions of law are correct. Laws v. Armontrout, 834 F.2d 1401, 1407 (8th Cir. 1987), cert. denied, 490 U.S. 1040 (1989). As we stated above, while we are certainly aware that the Missouri courts "have the final authority to interpret . . . that state's legislation," Brown, 432 U.S. at 167 (citing Garner v. Louisiana, 368 U.S. 157, 169 (1961)); see Maggitt v. Wyrick, 533 F.2d 383 (8th Cir.), cert. denied, 429 U.S. 898 (1976), we must consider claims asserting constitutional violations. See 28 U.S.C. § 2254 (1988 & Supp. IV 1992); Pitts v. Lockhart, 911 F.2d 109, 112 (8th Cir. 1990) (section 2254 requires federal court to consider "only claims raising violations of the Constitution or laws or treaties of the United States"), cert. denied, 111 S.Ct. 2896 (1991). With these principles in mind, we now analyze the Missouri Court of Appeals' legal determination regarding tampering and stealing, and the constitutional ramifications of the Missouri court's interpretation of the two statutes in McIntyre's case.

In considering McIntyre's claim that first-degree tampering is a lesser included offense of stealing an automobile, the Missouri Court of Appeals relied upon another state court of appeals case, State v. Smith, 655 S.W.2d 626 (Mo. Ct. App. 1983), to conclude that auto tampering is not a lesser included offense of auto theft. McIntyre, 749 S.W.2d at 422. Smith held that a denial of a second-degree tampering instruction as a lesser included offense of stealing was not error. 655 S.W.2d at 628. Smith carefully outlined the stealing and second-degree tampering statutes and compared the legal and factual elements of both.

Id. That court then held second-degree tampering could not be a lesser included offense of stealing because the stealing statute requires an intent to deprive the owner of property permanently, while the tampering statute only requires an intent to deprive the owner of the property temporarily. Id. Other courts of appeals in Missouri have reached the same result regarding second-degree tampering. See, e.g., State v. Souders, 703 S.W.2d 909, 911 (Mo. App. 1986); State v. Gobble, 675 S.W.2d 944 (Mo. App. 1984), and State v. Rivers, 663 S.W.2d 255, 256 (Mo. App. 1983). When the Missouri Court of Appeals rejected McIntyre's argument that first-degree tampering was a lesser-included offense of stealing, it relied on Gobble, 675 S.W.2d at 944. See McIntyre, 749 S.w.2d at 422 n.1. The appellate court in Gobble held that second-degree tampering was not a lesser included offense of stealing or attempted stealing. 675 S.W.2d at 949. Gobble is significant because that court analyzed this issue by comparing the statutory elements of the offenses, an analysis the Missouri court did not follow in deciding McIntyre's case. Cf. McIntyre, 749 S.W.2d at 422. Gobble pointed out that tampering requires a substantial inconvenience by depriving the owner of his property temporarily. 675 S.W.2d at 649. Actually, the second-degree tampering statute enumerates four disjunctive definitions of criminal activity, two of which could be applicable to an automobile: one involving tampering with property for the purpose of causing substantial inconvenience to the owner or another, and one subsection involving unlawfully riding in or upon another's automobile. See Mo. Rev. Stat. § 569.090. Both of these elements differ significantly from the first-degree tampering elements of knowingly possessing or unlawfully operating an automobile without the consent of the owner thereof. See Mo. Rev. Stat. § 569.080(2). We observe that State v. Walton, 703 S.W.2d 540, 542 (Mo. App. 1985),

cert. denied, 499 U.S. 931 (1991), contains an interesting discussion of the statutory elements of tampering in the first degree. Walton held that an instruction on tampering in the first degree was error for failure to submit the statutory element of defendant's knowledge, but that the error was not prejudicial. Id. In considering McIntyre's claim, the Missouri court did not cite Walton or compare the elements of first-degree tampering and stealing, but only cited cases which dealt with second-degree tampering as authority for its conclusion that first-degree tampering is not a lesser included offense of stealing.

In addition, the Missouri Court of Appeals relied on the length of time between the events constituting the offenses to justify its conclusion in McIntyre's case that tampering and stealing are separate offenses. After observing that "tampering was not part of the stealing that occurred two days earlier," the Missouri court opined that had McIntyre been charged with stealing and tampering based solely on his driving the car away from the dealership's lot, "it would have constituted only one offense." 749 S.W.2d at 422. In so stating, the Missouri court relied on a dissenting opinion in Brown regarding whether temporal or spatial proximity may be considered in determining if more than one offense was committed, id. (citing Brown, 432 U.S. at 171 (Blackmun, J., dissenting)), but ignored the Supreme Court's holding in Brown that time and space are irrelevant to a double jeopardy determination, 432 U.S. at 169. It thus adopted a holding contradictory to the Supreme Court's view. The Missouri court did not analyze the claim under Blockburger and never compared the elements of the stealing and first-degree tampering statutes. In 1977, well before McIntyre's case arose, Missouri codified the Blockburger test and has since statutorily required a court to consider the elements of the

offenses when determining whether one offense is a lesser included offense of another. See Mo. Rev. Stat. § 556.046 (Supp. 1994); see e.g., State v. Villa-Perez, 835 S.W.2d 897, 903 (Mo. 1992) (en banc) (stating that section 556.046 codified the lesser included offense test announced in Blockburger). The Missouri court did not follow this statutory mandate in its opinion in McIntyre's case.

Although federal courts considering habeas matters must apply the state court's interpretation of state law, federal courts are not required to follow the state case if the construction would have an unconstitutional effect on the defendant. Cokeley v. Lockhart, 951 F.2d 916, 919 (8th Cir. 1991), cert. denied, 113 S. Ct. 296 (1992). We are satisfied that the Missouri appellate court's decision is an inadequate analysis of the double jeopardy issue involved in determining whether first-degree tampering is a lesser included offense of stealing. Indeed, it does not come to grips with the issues, and thus it is not a constitutionally valid analysis of this issue which is binding upon us.

The Missouri Supreme Court has not decided whether first-degree tampering is a lesser included offense of stealing. We are convinced that if the Missouri Supreme Court were to consider the issue, it would determine that first-degree tampering is a lesser included offense of stealing. We reach this conclusion because those cases that have squarely dealt with the statutory elements of first-degree tampering have correctly recognized and articulated the elements that were submitted to the jury in McIntyre's tampering case, and we believe the Missouri Supreme Court would reject the analysis made by the Missouri Court of Appeals in McIntyre's case. It is our obligation to analyze this issue de novo, particularly as it involves the interpretation of Missouri statutes, to

determine the statutory elements of the two offenses, and to determine whether the one may be the lesser included offense of the other.

Applying the Blockburger test, we compare tampering in the first degree with stealing as defined by the Missouri statutes to determine if each statute requires proof of an element that the other does not. See 284 U.S. at 304. McIntyre argues that the offense of stealing contains all of the elements required in the first-degree tampering offense. Specifically, he argues that a defendant cannot be guilty of stealing an automobile in Missouri unless he is also guilty of tampering in the first degree because stealing contains the two elements of first-degree tampering with the additional element of intent to deprive.

The same elements test, the sole standard we must apply in double jeopardy cases like the one before us today, requires that "each offense contain an element not contained in the other." Dixon, 113 S. Ct. at 2856. Here, each offense does not require proof of an additional element that the other does not and, therefore, they are not separate offenses under Blockburger.[7] Only the stealing offense contains an element--the requirement of an intent to permanently deprive the owner--which is not included in the first-degree tampering

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[7]We recognize that in McIntyre II we made a statement to the contrary, see 975 F.2d at 443. This statement is contrary to other statements in that opinion, which we have set out above. See supra, at 5-6. Our statements to the contrary in the vacated opinion in McIntyre were simply wrong, and comparing the elements in first-degree tampering and stealing demonstrates as much.

statute. There is simply no element in the tampering statute to be proven that is not a part of the stealing statute. Because a person cannot steal a vehicle without also tampering with it in the first degree, the two offenses must be considered the "same" for purposes of Blockburger.

For the foregoing reasons, we reverse and remand to the district court with directions to grant McIntyre's writ of habeas corpus, and vacate the stealing conviction.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2700

Terry D. McIntyre,	)	
	)	
Appellant,	)	Remand from the
	)	United States
v.	)	Supreme Court.
	)	
Myrna Trickey,	)	
	)	
Appellee.	)	

Submitted: May 27, 1992

Filed: September 4, 1992

Before McMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

This case is before us on remand from the United States Supreme Court. In McIntyre v. Trickey, 938 F.2d 899 (8th Cir. 1991), we held that a state attorney's prosecution of Terry D. McIntyre for stealing an automobile violated the Fifth Amendment's Double Jeopardy Clause because McIntyre had earlier been prosecuted for first-degree tampering based on his unauthorized operation of the same

automobile. Id. at 905-07. Our decision applied the rule of Grady v. Corbin, 495 U.S. 508 (1990), which states that the Double Jeopardy Clause blocks a subsequent prosecution if the government, to establish an essential element of the charge to be prosecuted, will prove conduct constituting an offense for which the defendant has already been prosecuted. Id. at 521. In United States v. Felix, 112 S. Ct. 1377 (1992), the Supreme Court recently announced limitations on the Grady rule. The Court vacated our opinion in McIntyre, and remanded for reconsideration in light of Felix. Caspari v. McIntyre, 112 S. Ct. 1658 (1992). Relying on Grady, as modified by Felix, we again hold that the second prosecution of McIntyre violated the Double Jeopardy Clause.

In June 1986, a circuit court in the City of St. Louis found McIntyre guilty of first-degree tampering, based on his operation of an automobile owned by a Kirkwood, Missouri, car dealership with the knowledge that he lacked the owner's consent. In February 1987, a circuit court in the County of St. Louis convicted McIntyre of stealing that same automobile from the dealership.

The Missouri Court of Appeals rejected McIntyre's double jeopardy claim. State v. McIntyre, 749 S.W.2d 420, 422 (Mo. Ct. App. 1988). McIntyre filed a petition for a writ of habeas corpus in the district court based on his double jeopardy claim.[8] A magistrate judge recommended denying

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[8]Nothing appears in the record regarding McIntyre's efforts to exhaust his state remedies. The State of Missouri, in its response to McIntyre's federal habeas petition, stated that McIntyre had exhausted all state remedies on his double jeopardy claim and his petition was not procedurally barred.

McIntyre's petition because under Missouri law, tampering is not a lesser-included offense of stealing. McIntyre v. Trickey, No. 88-1708C(2), slip op. at 3-4 (E.D. Mo. Nov. 2, 1988) (magistrate's report). The district court adopted the magistrate's report and recommendation. Order of Nov. 22, 1988, slip op. at 1. After McIntyre refined and reasserted his claim in a motion to alter or amendment [sic] judgment, the magistrate again recommended denying relief, Magistrate's Report of August 8, 1989, slip op. at 12, and the district court adopted that recommendation. Order of September 18, 1989, slip op. at 1.

After proceedings in the district court, the Supreme Court issued its opinion in Grady v. Corbin, and McIntyre asserted a Grady claim before this court. This court rejected the State of Missouri's arguments that we should not reach the merits because McIntyre had failed to exhaust state remedies and had committed "abuse of the writ." McIntyre, 938 F.2d at 901-02. We also held that McIntyre was entitled to rely on Grady although that case prescribed a "new rule" under Teague v. Lane, 489 U.S. 288 (1989). McIntyre, 938 F.2d at 902-04. We concluded that the Grady rule fit into one of the two Teague exceptions that allow retroactive application of new rules for cases on collateral review. Id.

We concluded under Grady that the second prosecution of McIntyre violated the Double Jeopardy Clause because "the government, to establish essential elements of the stealing charge, proved conduct that constituted an offense for which McIntyre had already been prosecuted." Id. at 906.

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jeopardy claim and his petition was not procedurally barred. 938 F.2d at 900-01.

We observed that in the second trial, for stealing, the "government proved the same conduct that it had proved to establish the entirety of the tampering offense." Id. (emphasis added). We then observed that the conduct that proved the tampering offense was used to prove "the whole of . . . two elements" of the stealing charge. Id.

After the Supreme Court vacated our decision with directions to reconsider in light of Felix, the parties submitted letter briefs at our request.

The State of Missouri again argues that McIntyre should be prohibited from proceeding on the merits because he failed to exhaust his double jeopardy claim in the state courts. The State also repeats its argument that McIntyre cannot rely on Grady because that case announced a "new rule" after his conviction became final.

We are not persuaded by the State's arguments and adhere to our earlier holdings on these issues.[9] See 938 F.2d at 901-04.

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[9]We are aware of the Second Circuit's decision in United States v. Salerno, 964 F.2d 172 (2d Cir. 1992), disagreeing with our conclusion that the Grady rule is retroactively available to habeas petitioners because it falls within one of the two Teague exceptions. Id. at 176-79. We adhere to our holding that Grady must be accorded retroactive effect because the prohibition on double jeopardy is a "'categorical guarantee[] accorded by the Constitution.'" McIntyre, 938 F.2d at 904 (citation omitted).

The State next contends that Felix requires denial of McIntyre's petition for a writ of habeas corpus. Specifically, the State asserts that: (1) McIntyre was prosecuted at the first trial only for tampering and at the second trial only for stealing; (2) a mere overlap in proof between the two prosecutions does not establish a double jeopardy violation; and (3) the conduct constituting the two offenses, stealing and tampering, occurred on different days and the Double Jeopardy Clause thus does not bar separate prosecutions.

The resolution of this case turns on the extent to which Felix modifies the rule of Grady. The Grady test is relatively simple in its formulation: The Double Jeopardy Clause bars a "subsequent prosecution [if] . . . the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 495 U.S. at 521. In Felix, however, the Supreme Court refused to apply this language to bar a prosecution for conspiracy to manufacture, possess, and distribute methamphetamine when two of the nine overt acts supporting the conspiracy charge were based on conduct for which Felix had previously been prosecuted. 112 S. Ct. at 1380, 1385. The Court also held that prosecution on related substantive counts was not barred even though evidence concerning the underlying conduct had been introduced in a previous drug trial to establish Felix's criminal intent. Id. at 1380, 1382-83.

In its discussion, the Court distinguished between prosecution for an offense and the introduction of relevant evidence of particular misconduct. Id. at 1383. It also distinguished between crimes involving a "'single course of

conduct'" and those involving "'multilayered conduct as to time and place.'" Id. at 1385.

Felix thus limited, but did not discard Grady. Our task is to determine whether the nature of McIntyre's criminal conduct and the scope of the two prosecutions still bring this case within the Grady rule or cast it into one of the categories covered by Felix.

In Grady, the Court held that the Double Jeopardy Clause barred the prosecution of a motorist for criminally negligent homicide and assault after he had earlier pled guilty to driving while intoxicated and failing to keep to the right of the median in connection with the same accident. 495 U.S. at 521-23. The Court observed that the State of New York admitted that it planned to prove "the entirety of the conduct for which Corbin was convicted--driving while intoxicated and failing to keep right of the median--to establish essential elements of the homicide and assault offenses." Id. at 523. The Court stated, however, that the State could proceed with the prosecution if it relied on conduct, such as driving too fast in a heavy rain, for which Corbin had not already been convicted. Id. It also limited its holding by stating that the presentation of specific evidence in one trial would not "forever prevent the government from introducing that same evidence in a subsequent proceeding." Id. at 521-22. "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." Id. at 521.

Felix presented a far different factual pattern than that of Grady. The government first prosecuted Felix in the Western District of Missouri for the attempt to manufacture methamphetamine between August 26 and 31, 1987, based on

the delivery of precursor chemicals and equipment to him at Joplin, Missouri. 112 S. Ct. at 1379. To counter Felix's defense that he lacked criminal intent with respect to the delivery, the government introduced evidence that he had manufactured methamphetamine in Oklahoma earlier in 1987. Id. at 1380. The government introduced the evidence under Federal Rule of Evidence 404(b), and the district court instructed the jury that the evidence of the Oklahoma activities was admissible only to show Felix's state of mind regarding the chemicals and equipment he attempted to purchase in Missouri. Id.

The government later prosecuted Felix in the Eastern District of Oklahoma for conspiracy to manufacture, possess, and distribute methamphetamine between May 1, and August 31, 1987. Two of the nine overt acts supporting the conspiracy charge were based on conduct that had been the subject of the Missouri prosecution. Id. The government also prosecuted Felix on related substantive charges. Id. at 1380-81.

The Court first rejected the argument that the Double Jeopardy Clause barred Felix's prosecution on the substantive drug offenses even though the government had presented evidence of those offenses at the earlier Missouri trial. "Felix was charged in the Missouri case only with attempting to manufacture methamphetamine in Missouri, in late August 1987" while in the Oklahoma case, he "was charged with various drug offenses that took place in Oklahoma in June and July 1987." Id. at 1382. The Court explained: "The actual crimes charged in each case were different in both time and place; there was absolutely no common conduct linking the alleged offenses." Id.

The Court further stated that although evidence of the Oklahoma transactions was admitted at the Missouri trial, it was introduced simply to "help show Felix' state of mind" and that "he was not prosecuted in the Missouri trial for any offense other than the Missouri attempt offense. . . . " Id. (emphasis in original). Citing Dowling v. United States, 493 U.S. 342 (1990), the Court observed: "[T]he introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." Id. at 1383.

The Court next rejected the argument that the prosecution of Felix on the Oklahoma conspiracy charge violated double jeopardy because two of the nine overt acts supporting the conspiracy charge concerned conduct for which Felix had been previously prosecuted in Missouri. Id. at 1383-85. The Court refused to apply Grady in this context: "Taken out of context, and read literally, this language [in Grady] supports the defense of double jeopardy. But we decline to read the language so expansively, because of the context in which Grady arose and because of difficulties which had already arisen in its interpretation." Id. at 1383-84.

The Court rejected the double jeopardy claim because of "long established precedent," id. at 1383, holding that conspiracy to commit an offense and the offense itself "are separate offenses for double jeopardy purposes." Id. at 1385. The Court then addressed the basis of Grady's holding, stating that although the traffic offenses in that case "were not technically lesser-included offenses of the homicide and assault charges," they were analogous to charges discussed in Illinois v. Vitale, 447 U.S. 410 (1980), which the Court had labeled a "'species of lesser included offense.'" Felix, 112 S. Ct. at 1384. In Vitale, the Court stated in dicta that a traffic conviction for failure to reduce speed might be viewed as a

"'species of lesser included offense'" if the State relied on the conduct underlying that conviction to prosecute the motorist on a manslaughter charge arising from the same accident. Id. at 1384 (citing Vitale, 447 U.S. at 420). In Grady, the Court "simply adopted the suggestion [it] had previously made in dicta in Vitale." 112 S. Ct. at 1384.

The Court then distinguished between cases involving a "'single course of conduct'" and those involving "multilayered conduct as to time and place." Id. at 1385. Although reliance on a lesser-included offense analysis may be useful in the former situation, it is "much less helpful in analyzing" the latter. Id. (citing Garrett v. United States, 471 U.S. 773 (1985)[]).

Felix therefore suggests that the Grady rule applies in cases where the criminal activity was limited to a "single course of conduct" rather than to cases involving certain types of "multilayered conduct." See United States v. McHan, 966 F. 2d 134, 140-41 (1992) (as amended). If a single course of conduct is involved, we must then determine whether one of the charged offenses is a "species of lesser included offense" of a greater offense charged in a separate prosecution. See Sharpton v. Turner, 964 F.2d 1284, 1288 (2d Cir. 1992).

We consider the threshold issue of the nature of the conduct involved. The evidence admitted in his two trials showed that on November 22, 1985, McIntyre entered a car dealership in Kirkwood, Missouri, and arranged to go on a test drive with a salesman, Steven George. While George was getting the keys to the demonstrator car, McIntyre remained in the showroom looking at another car that had keys in its ignition that were similar to the keys of the demonstrator car. After McIntyre took the test drive with

George, he gave a set of keys to the salesman. About fifteen minutes after McIntyre left the dealership, George and another salesman discovered that the demonstrator's keys were missing and that the keys returned by McIntyre were the keys to the showroom model.

Two days later, on November 24, two police officers spotted McIntyre driving the stolen car. After a pursuit, the officers stopped the car and arrested McIntyre and a passenger. The officers discovered the missing keys in the car's ignition.

A circuit court jury in the City of St. Louis found McIntyre guilty of first-degree tampering, Mo. Rev. Stat. § 569.080 (1986), based on his unauthorized operation of the car on November 24 with the knowledge that he lacked the owner's consent. A circuit court jury in the County of St. Louis later found McIntyre guilty of felony stealing, Mo. Rev. Stat. § 570.030 (1986), based on his taking the same car without the owner's consent for the purpose of withholding it permanently from the owner.

The criminal activity at issue here--stealing a car and then driving it--is not the type of "multilayered conduct as to time and place" that the Court exempted from the Grady rule in Felix. See 112 S. Ct. at 1385. Clear support for this conclusion appears in Felix, where the Court distinguished multilayered conduct from the "'classically simple situation presented in Brown [v. Ohio].'" Id. (citing Garrett, 471 U.S. at 789).

In Brown v. Ohio, 432 U.S. 161 (1977), the Court applied the double jeopardy rule of Blockburger v. United States, 284 U.S. 299, 304 (1932), to bar a subsequent

prosecution for auto theft after the defendant had earlier been convicted of joyriding in connection with the same automobile. Brown, 432 U.S. at 168-70. Like McIntyre, the Brown defendant stole a car and drove it for several days. Id. at 162.[10]

We conclude that McIntyre's criminal activity was as "classically simple" as that of the Brown defendant, and involved a "single course of conduct" rather than "multilayered conduct." See United States v. Pungitore, 910 F.2d 1084, 1110-11 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009-11 (1991). This determination does not settle the question, however, as to whether Grady renders unconstitutional McIntyre's second prosecution. We must also consider whether the two offenses of which McIntyre was convicted, first-degree tampering and stealing, are of such a character that one may be considered a "species of lesser included offense" under Felix.

In the tampering case, the court stated in its charge to the jury that McIntyre could not be found guilty unless jury members found that he knowingly operated the car in question, that he lacked the owner's consent to do so, and that he had knowledge of that lack of consent. In the stealing trial, the jury charge stated that McIntyre could not be found guilty unless jury members found that he took the automobile in question, that he did so without the consent of the owner,

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[10]Brown does not control this case because under Missouri law, tampering is not a lesser included offense of stealing. State v. Rivers, 663 S.W.2d 255, 256 (Mo. Ct. App. 1983). In Brown, joyriding was a lesser included offense of auto theft under Ohio law. Brown, 432 U.S. at 168.

and that he did so for the purpose of withholding it permanently from the owner. (938 F.2d at 906).

Neither one of these offenses is a lesser-included offense of the other under the Blockburger standard, for each requires proof of an element that the other does not. See Blockburger, 284 U.S. at 304. Felix teaches, however, that even if one offense is "technically" not a lesser-included offense, it still may be considered a "'species of lesser included offense.'" Felix, 112 S. Ct. at 1384. Although the Court in Felix did not define that phrase, its discussion indicated that a "species of lesser included offense" would include an "offense that is a permissible but not necessary predicate[]" of a greater offense. Sharpton, 964 F.2d at 1288. This type of lesser offense was at issue in Grady, where "the State sought to rely on the two previous traffic offense convictions to sustain the homicide and assault charges . . . ." Felix, 112 S. Ct. at 1384.

We conclude that on the facts of this case, the first-degree tampering charge must be viewed as a species of lesser-included offense of the greater offense of stealing under the Felix analysis. As in Grady, the government relied on conduct for which McIntyre had already been convicted to sustain the later charge. See McIntyre, 938 F.2d at 906. Although it is not necessary to rely on a thief's unauthorized operation of a car to prove that he stole the car, in this case the government relied on that conduct (which constituted the entirety of the tampering case) to prove that McIntyre stole the car. Thus, the tampering conviction was a "species of lesser included offense."

The final issue raised by Felix is whether the government actually prosecuted McIntyre in his first trial for

the activities that were later used to prove the stealing charge. See Felix, 112 S. Ct. 1382-83. In Felix, the Court made clear that the "introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." Id. at 1383. The Court then concluded that the introduction of the Oklahoma transactions to prove intent at the Missouri trial did not constitute "prosecution" for the Oklahoma transactions. Id. The government "simply introduced those transactions as prior acts evidence under Rule 404(b)." Id.

A far different situation is presented here. The government, to establish essential elements of the stealing charge, proved conduct--operating an automobile without the owner's consent--for which McIntyre had actually been prosecuted. See McIntyre, 938 F.2d at 906. Unlike [in] Felix, the government here did not introduce conduct pertaining to a separate crime at the first trial simply to help prove an element of the crime charged; rather, the conduct the government proved constituted the entirety of the crime prosecuted at the first trial. Moreover, the same conduct was proved to establish nearly the entirety of the offense charged in the second prosecution. See id.

Having analyzed the concerns raised by Felix, we again hold that the prosecution of McIntyre for stealing violated the Fifth Amendment's prohibition against double jeopardy. We are not persuaded by the government's argument that McIntyre was prosecuted at the first trial only for tampering and at the second trial only for stealing. In the stealing trial, the government proved the same conduct it had proved to establish the entirety of the tampering offense; significantly, it proved that conduct to establish nearly the entirety of the stealing charge. McIntyre, 938 F.2d at 906.

This was not a situation involving a "mere overlap" in proof. See Felix, 112 S. Ct. at 1382 ("a mere overlap in proof between two prosecutions does not establish a double jeopardy violation"). The same conduct was proved at both trials to establish charges that were nearly identical.

We also are not persuaded by the State's argument that the tampering offense and the stealing offense occurred on different days. As we stated in our first opinion, "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.'" 938 F.2d at 906 (citing Brown, 432 U.S. at 169).

For the foregoing reasons, we reverse the judgment of the district court and remand with instructions to grant the writ of habeas corpus.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2700

Terry D. McIntyre,	*	
	*	
Appellant,	*	Appeal from the
	*	United States
v.	*	District Court for
	*	the Eastern
Myrna Trickey,	*	District of
	*	Missouri.
Appellee.	*	

Submitted: January 11, 1991

Filed: July 15, 1991

Before McMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Terry D. McIntyre appeals from the district court's denial of his petition for writ of habeas corpus based on a claim of double jeopardy. McIntyre argues that the government, to establish essential elements in his prosecution for stealing, proved conduct that constituted an offense, first degree tampering, for which he had earlier been convicted,

thus violating the double jeopardy rule announced in Grady v. Corbin, 110 S. Ct. 2084 (1990). The State argues that: 1) McIntyre is procedurally barred from asserting his double jeopardy claim; and that 2) McIntyre cannot assert a Grady claim, as Grady announced a "new rule" that is not retroactively available to federal habeas petitioners. Moreover, the State argues that even if Grady applies, McIntyre cannot prevail under the rule of that case. The magistrate, whose report and recommendation the district court adopted, did not analyze McIntyre's double jeopardy claim under Grady, as Grady had not yet been decided. We reverse the district court's order.

In June 1986, a jury in the circuit court of the City of St. Louis found McIntyre guilty of first degree tampering under Mo. Rev. Stat. §569.080 (1986), based on his operation on November 24, 1985, of an automobile knowing that he lacked the owner's consent. The Missouri Court of Appeals affirmed the conviction. State v. McIntyre, 735 S.W.2d 111 (Mo. Ct. App. 1987).

In February 1987, a jury in the circuit court in the County of St. Louis found McIntyre guilty of felony stealing under Mo. Rev. Stat. § 570.030 (1986), based on his stealing of that same automobile from a car dealership on November 22, 1985. The Missouri Court of Appeals, rejecting McIntyre's double jeopardy claim, affirmed the conviction. State v. McIntyre, 749 S.W.2d 420 (Mo. Ct. App. 1988). On each conviction, McIntyre was sentenced as a persistent offender to ten years imprisonment, with the second sentence to run consecutively to the first.

The evidence presented at both trials established that on November 22, 1985, a man who identified himself only as

"Johnny" entered the Mitsubishi dealership in Kirkwood, Missouri, and told salesman Steven George that he wanted to test drive a Mitsubishi Galant. While George was getting the keys to a Galant demonstrator, "Johnny" remained in the showroom where he was looking at the interior of another Galant. The showroom car had keys in its ignition, and those keys were similar to the keys of the demonstrator Galant. After "Johnny" took a test drive with George, he gave a set of Galant keys to George, who returned them to the dealership's "key board." About 15 minutes after "Johnny" left the dealership, George and another salesman discovered that the demonstrator Galant was missing and that the keys which George had placed on the board were from the showroom Galant at which "Johnny" had been looking. "Johnny" was the only person who had taken a ride with George in the demonstrator Galant on that day.

On November 24, 1985, two Kirkwood police officers spotted McIntyre driving the demonstrator Galant, which had been listed on a "hot sheet" of stolen cars. After a pursuit, the officers stopped the car and arrested McIntyre, who was driving, and a passenger. When the car was stopped, the missing Galant keys were in the ignition.

In a photographic line-up on November 27, George identified McIntyre as "Johnny." George testified at both of McIntyre's trials, as did Jake Naughton, general manager of the Mitsubishi dealership. Officer Kenneth Hornak, one of the two arresting officers, testified at the tampering trial, while the other officer, Lawrence O'Toole, testified at both trials.

McIntyre first raised his double jeopardy claim prior to his trial on the stealing charge, and he unsuccessfully

reasserted this claim on appeal. McIntyre, 749 S.W.2d at 422.

Nothing appears in the record regarding McIntyre's post-conviction proceedings in Missouri state courts. The State admitted in its response to McIntyre's federal habeas petition that McIntyre had exhausted all state remedies on his double jeopardy claim and was not procedurally barred. See Response to Order to Show Cause at 3. In a November 1988 report and recommendation, the magistrate stated that the State had conceded exhaustion. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 2 (magistrate's report) (E.D. Mo. Nov. 2, 1988).

McIntyre has restricted his federal habeas litigation to his double jeopardy claim. In is original federal petition, filed pro se, McIntyre did not cite Grady (as that case had not yet been decided), but he did clearly and thoroughly assert a double jeopardy claim.

In his November 1988 report, the magistrate recommended denying McIntyre's petition because under Missouri law, tampering is not a lesser included offense of stealing the same vehicle. Slip op. at 3-4 (magistrate's report) (November 2, 1988). The district court adopted the magistrate's report and recommendation. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 1 (E.D. Mo. Nov. 22, 1988). After McIntyre refined and reasserted his claim in a motion to alter or amend judgment, the magistrate issued a second report, again recommending denial of McIntyre's petition. The magistrate reconsidered McIntyre's claim under

the "same evidence test"[1] and concluded that despite the use of the same evidence at both trials, the evidence submitted at the tampering trial was not legally sufficient to convict McIntyre of stealing. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 12 (magistrate's report) (E.D. Mo. Aug. 8, 1989). The district court adopted the magistrate's second report and recommendation. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 1 (E.D. Mo. Sept. 18, 1989).

Through appointed counsel, McIntyre now presents this double jeopardy claim to this court.

I.

While McIntyre contends that he is entitled to relief under Grady, the State asserts that we must not reach the merits of the Grady claim because: 1) McIntyre asserted a new type of double jeopardy claim in his motion to alter or amend before the district court that was not presented in his original federal habeas petition; 2) the rule of Teague v. Lane, 489 U.S. 288 (1989), bars the application of Grady because McIntyre's conviction was final before Grady was announced.

The State's first argument can be summarized as follows: In his original habeas petition, McIntyre argued that

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[1]Prior to Grady, several circuits had developed a "same evidence" test that looked at whether "the evidence required to support conviction in one of the prosecutions is sufficient to support conviction in the other prosecution." United States v. Tercero, 580 F.2d 312, 314 (8th Cir. 1978); See also Grady, 110 S. Ct. at 2094 n.14; United States v. Ragins, 840 F.2d 1184, 1188 (4th Cir. 1988).

his double jeopardy claim should be analyzed under the "same offense" test applied in Brown v. Ohio, 432 U.S. 161 (1977). Because McIntyre in his motion to alter or amend urged the court to instead apply the "same evidence" test, he presented a claim different from the one he originally asserted. The State contends that McIntyre's failure to assert the "same evidence" test in his initial federal habeas petition constituted "abuse of the writ" under 28 U.S.C. § 2254, Rule 9(b) (1988), and also resulted in procedural default because McIntyre failed to exhaust the "same evidence" theory in the state courts.

The magistrate's second report, which the district court also adopted, rejected the State's arguments regarding abuse of the writ and procedural default. The magistrate concluded that the court should address the merits of McIntyre's claim because his motion did not present a new claim, but merely "clarif[ied]" the existing one. Slip op. at 4 (magistrate's report) (Aug. 8, 1989).

The State's argument rests solely on its contention that McIntyre raised a new theory in his motion to alter or amend judgment that he had not presented in his original federal habeas petition. In its response to McIntyre's original federal petition, the State had conceded that McIntyre had exhausted his double jeopardy claim before the state courts and was not procedurally barred from raising the claim presented in that initial petition.

An examination of the pleadings that McIntyre submitted in connection with his initial petition and with his motion to alter or amend judgment establishes that, contrary to the State's argument, the substance of his claim remained essentially the same. In both the original petition and the

motion to alter or amend, McIntyre argued that the government used the same evidence to convict him at both trials, thus violating the Fifth Amendment's double jeopardy clause. Although McIntyre conceded in his motion to alter or amend that Brown v. Ohio, which he had relied on in his original petition, was not persuasive authority for his argument, he otherwise relied on the same authority and asserted the same basic argument.

As McIntyre presented essentially the same claim in his motion to alter or amend judgment as he presented in the original habeas petition, we conclude that the State's arguments regarding abuse of the writ and procedural bar are without merit.[2] We therefore affirm the district court's order adopting the magistrate's report and recommendation on this issue.

II.

The State next argues that Teague v. Lane, which held that federal habeas petitioners may not attack their conviction by relying on a rule of law established after their conviction became final, 489 U.S. at 310, prevents McIntyre from

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[2]The State cites two cases, Buckley v. Lockhart, 892 F.2d 715, 719 (8th Cir. 1989), cert. denied, 110 S.Ct. 3243 (1990), and Gilmore v. Armontrout, 861 F.2d 1061, 1064-65 (8th Cir. 1988), cert. denied, 490 U.S. 1114 (1989), to support its argument that McIntyre is procedurally barred on his same evidence theory. These cases are clearly distinguishable from the one before us, as the essence of McIntyre's claim remained the same.

relying on Grady.[3] McIntyre counters that Grady did not announce a "new rule" under Teague, but merely built upon the Court's previous double jeopardy decisions, including Illinois v. Vitale, 447 U.S. 410 (1980).

Under Teague, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (emphasis in original). See also Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990) (test is whether a state court considering petitioner's claim at the time the conviction became final "would have felt compelled by existing precedent to conclude that the rule [petitioner sought] was required by the Constitution").

Grady held that "a subsequent prosecution must do more than merely survive the Blockburger test." 110 S. Ct. at 2093. See Blockburger v. United States, 284 U.S. 299, 304 (1932). (double jeopardy clause is not violated if each statute requires proof of a fact which the other does not). Even if the Blockburger "same offense" test is satisfied, the double jeopardy clause still bars the "subsequent prosecution [if] the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady 110 S. Ct. at 2093.

An examination of Grady establishes that this rule was not dictated by precedent existing at the time McIntyre's

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[3]Direct review of McIntyre's second conviction was complete in May 1988. The Supreme Court announced Grady in May 1990.

conviction became final, and thus, was a new rule. In fact, the Grady Court explicitly stated that it was "adopt[ing] the suggestion set forth in Vitale." 110 S. Ct. at 2087 (emphasis added). See also id. at 2093 ("As we suggested in Vitale. . . .") (emphasis added).

Justice Scalia's dissenting opinion in Grady, joined by Justices Rehnquist and Kennedy, leaves no doubt that the dissent also regarded the Grady test as a new rule. The dissent attacked the majority for "departing from clear text and clear precedent with no justification except the citation of dictum in a recent case (dictum that was similarly unsupported and inconclusive to boot)." 110 S. Ct. at 2096 (Scalia, J., dissenting).

An examination of Vitale, relied on by the Grady majority, confirms that Grady indeed announced a new rule. While Vitale merely urged an expanded approach to double jeopardy analysis, see Vitale, 447 U.S. at 420, Grady explicitly prescribed a new test to be applied in cases involving subsequent prosecutions that do not violate the Blockburger rule. As the Grady rule was not dictated" by precedent, we conclude that it is therefore a "new rule" under Teague.

Our analysis of the Teague issue does not, however, end with our conclusion that Grady announced a new rule. Despite the general bar on retroactive application of new rules for cases on collateral review, new rules under Teague are fully retroactive if they fit into one of two exceptions. Teague, 490 U.S. at 311.

Teague stated that a habeas petitioner may rely on a new rule: 1) "if it places 'certain kinds of primary, private

individual conduct beyond the power of the criminal law-making authority to proscribe'"; or 2) "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" Id. As a double jeopardy rule does not concern the fairness of the procedures used to convict, the second exception is not applicable here.

The first exception, narrowly defined in Teague, was expanded in Penry v. Lynaugh, 492 U.S. 302 (1989), a case addressing the constitutionality of imposing the death penalty on mentally retarded defendants. Although Teague described the first exception as "focusing solely on new rules according a constitutional protection to an actor's primary conduct," id. at 329, Penry suggested that the first exception also encompasses "substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed." Id. Deciding that a new rule prohibiting the execution of mentally retarded defendants would fit within the first Teague exception, the Court explained:

> "[A] new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity [expressed in Mackey v. United States, 401 U.S. 667 (1971)[,]] have little force."

492 U.S. at 330. The Penry Court added: "There is little societal interest in permitting the criminal process to rest at

a point where it ought properly never to repose.'" Id. (citing Mackey, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)). Thus, the first Teague exception "cover[s] not only rules forbidding criminal punishment of certain kinds of primary conduct, but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." 429 U.S. at 330.

In Butler v. McKellar, 110 S. Ct. 1212 (1990), and Saffle v. Parks, 110 S. Ct. 1257 (1990), the Court described the first Teague exception as encompassing "'categorical guarantees accorded by the Constitution' such as a prohibition on the imposition of a particular punishment on a certain class of offenders.'" Butler, 110 S. Ct. at 1218 (emphasis added). See also Saffle, 110 S. Ct. at 1263 (same). Thus, the Court cited the rule discussed in Penry as an illustrative example of a categorical constitutional guarantee, but did not use that rule to limit the scope of the exception.

The Fifth Amendment states that "[n]o person shall. . . be subject for the same offence to be twice put in jeopardy of life or limb. . . ." In North Carolina v. Pearce, 395 U.S. 711 (1969), the Court labeled the double jeopardy clause a "basic constitutional guarantee," id. at 718, and quoted an 1873 case that stated: "'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court on the same facts, for the same statutory offense.'" Id. at 717-718 (quoting Ex Parte Lange, 18 Wall. 163, 168 (U.S. 1873)).

The protection afforded by the double jeopardy clause operates at an elemental level. The purpose of the clause is not to ensure the fairness of the trial, but to prevent the trial from taking place at all. See Robinson v. Neil, 409 U.S. 505, 509 (1973). Because it bars an unconstitutional prosecution, a rule concerning double jeopardy is analogous to the rule discussed in Penry, which would have barred the imposition of an unconstitutional punishment. See Penry, 492 U.S. at 329-30. It thus follows that the prohibition on double jeopardy is a "categorical guarantee[] accorded by the Constitution." See Butler, 110 S. Ct. at 1218. We therefore conclude that a rule concerning double jeopardy, such as the Grady rule, falls under the first Teague exception and must be accorded full retroactive effect.

Our conclusion finds further support in the pre-Teague opinion of Robinson v. Neil, in which the Court accorded full retroactive effect to the double jeopardy rule it had earlier announced in Waller v. Florida, 397 U.S. 387 (1970). In Robinson, the Court refused to apply the prevailing standard, as prescribed in Linkletter v. Walker, 381 U.S. 618 (1965), for determining the retroactivity of constitutional rules. It stated that a rule concerning double jeopardy did not "readily lend[] itself" to a Linkletter analysis. Robinson, 409 U.S. at 507. The Court reasoned that while the double jeopardy guarantee, like other constitutional guarantees, is a right of the criminal defendant, "its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." Id. at 509.

Although Robinson has been superseded by Teague, we believe that the Robinson Court's observation about the nature of the double jeopardy guarantee retains its force and

is relevant to the issue before us. Because the double jeopardy clause prevents an unconstitutional trial from taking place, it deprives the court of jurisdiction. Historically, federal habeas review has existed to permit convicted prisoners to challenge the jurisdiction of the trial court. See 3 W. LaFave & J. Israel, Criminal Procedure § 27.3(a) (1984).

We therefore hold that although Grady announced a new rule, that rule is nonetheless available to petitioners challenging their convictions on collateral review.

III.

We now address the merits of McIntyre's double jeopardy claim. McIntyre argues that he is entitled to relief under Grady because his conviction for stealing relied on proof of conduct for which he had already been prosecuted. The State counters that McIntyre's double jeopardy rights were not violated because the tampering prosecution concerned conduct that occurred on the day that he was caught operating the car, while his stealing trial concerned conduct that occurred on the day he stole the car.

There is no dispute that Grady provides the relevant standard. The Supreme Court intended Grady "to guide double jeopardy analysis in all cases involving successive prosecutions." United States v. Calderone, 917 F.2d 717, 721 (2d Cir. 1990), petition for cert. filed, No. 90-1527 (Apr. 3, 1991). See also United States v. Easley, 927 F.2d 1442, 1451 (8th Cir. 1991).

Once a subsequent prosecution survives the Block-burger test, the court must next analyze if "the government, to establish an essential element of an offense charged in that

prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 110 S. Ct. at 2093. In Grady, the Court held that this rule barred the subsequent prosecution of a motorist for criminally negligent homicide and assault after he had earlier pled guilty to driving while intoxicated and failing to keep to the right of the median in connection with the same collision. Id. at 2094. The Court stated:

> By its own pleadings, the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted – driving while intoxicated and failing to keep to the right of the median – to establish essential elements of the homicide and assault offenses. Therefore, the Double Jeopardy Clause bars this successive prosecution. . . .

Id.

The Court added, however, that its holding would not bar a subsequent prosecution on the homicide and assault charges if the State relied solely on conduct, such as driving too fast in a heavy rain, for which Corbin had not already been convicted. Id. The Court clarified its holding by stating that the presentation of specific evidence in one trial would not "forever prevent the government from introducing that same evidence in a subsequent proceeding." Id. at 2093. It explained: "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." Id.

Under Grady, we must answer two questions: 1) Is the conduct the indictment requires to be proven conduct that

constitutes an offense for which the defendant has previously been prosecuted? and 2) Is it being proven to establish an essential element of the offense for which the defendant is now being prosecuted? See United States v. Felix, 926 F.2d 1522, 1532 (10th Cir. 1991) (Anderson, J., dissenting), petition for cert. filed, No. 90-1599 (Apr. 15, 1991).

In McIntyre's first trial, for tampering, the government presented the testimony of the two police officers who arrested McIntyre. They testified how they spotted the stolen Galant, pursued the vehicle and stopped it, and apprehended the driver, who turned out to be McIntyre. One of the officers testified that Mitsubishi keys were found in the ignition.

Jake Naughton, manager of the Mitsubishi dealership, testified that he had observed McIntyre speaking to salesman George on the day the car was stolen, that he saw George and McIntyre leave together to go on a test drive, and that the keys returned to the key board did not belong to the demonstrator Galant. Naughton also testified that McIntyre's use of the car on the day of the arrest was without permission. In his testimony, George identified McIntyre as the man he had observed looking at the showroom Galant and whom he later accompanied on a test drive of the demonstrator car. George also testified that McIntyre, after the drive, returned a set of Mitsubishi keys that were later discovered to be the keys to the showroom Galant. George also testified that he had examined the keys found in the car when McIntyre was apprehended, and that one of the those keys belonged to the stolen car.

At the second trial, for stealing, the government presented essentially the same evidence. Again, Naughton

and George testified as to the events that transpired at the dealership on November 22, 1985. One of the two arresting officers testified again, describing how he and his partner had observed the stolen car, pursued and stopped it, and apprehended McIntyre. The officer also testified that he saw keys in the ignition. The government also presented the testimony of a detective who had not testified at the first trial and who described the photographic lineup in which George had identified McIntyre.

Applying the Grady test to the facts before us, we focus on the conduct the government proved, not the evidence it used to prove that conduct. See Grady, 110 S. Ct. at 2093.

In the first trial, the government proved first degree tampering by establishing that McIntyre was apprehended while operating the car, that McIntyre lacked the dealership's consent to operate the car, and that he operated the car knowing that he lacked the consent.[4] While the testimony

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[4]The Court charged the jury in the tampering case as follows:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> > First, that on November 24, 1985, . . . the defendant knowingly operated a certain automobile, a 1986 Mitsubishi Galant, owned by Kirkwood Mitsubishi; and

about the vents at the car dealership did not directly concern McIntyre's operation of the car, it was relevant to the owner's lack of consent and McIntyre's knowledge that he lacked consent.

At the stealing trial, the government proved the same conduct that it had proved to establish the entirety of the tampering offense. Thus, the answer to the first inquiry under Grady -- whether the conduct being proved is conduct that constitutes a previously prosecuted offense -- must be "yes".

The second step in our analysis focuses on whether the conduct was proved to "establish an essential element" in the second prosecution. The elements of stealing, as stated in the charge to the jury, are:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First . . . the defendant took a 1986 Mitsubishi automobile, property owned by Kirkwood Mitsubishi, and

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> Second, that he operated the automobile without the consent of the owner, and
>
> Third, that he operated knowing that he did so without the consent of the owner, then you will find the defendant guilty of tampering in the first degree. . . .

> Second, the defendant did so without the consent of Kirkwood Mitsubishi, and
>
> Third, that defendant did so for the purpose of withholding it from the owner permanently, and
>
> Fourth, that the property taken was an automobile,
>
> then you will find the defendant guilty of felony stealing.

The conduct constituting the tampering offense was proved in the second trial to establish essential elements of the stealing charge. The testimony regarding the visit to the car dealership, together with the testimony concerning McIntyre's operation of the car, proved the entirety of the tampering offense, and nearly the entirety of the stealing offense. The only new witness presented by the government at the stealing trial was Detective Schneedle, who testified regarding the photographic lineup and George's identification of McIntyre. Even accepting that this testimony was necessary to help establish the first element of the stealing charge, the conduct proved at the first trial established the whole of the next two elements – the owner's lack of consent and McIntyre's purpose of withholding the car permanently from the owner.

Therefore, we conclude that McIntyre's second prosecution violated the rule of Grady because the government, to establish essential elements of the stealing charge, proved conduct that constituted an offense for which

McIntyre had already been prosecuted. See Grady, 110 S. Ct. 2093.

The State tries to distinguish from Grady by arguing that McIntyre was convicted of tampering based on the events that occurred on November 24, 1985, and that he was convicted of stealing based on events that occurred on November 22, 1985.

We are not persuaded by this argument. At both trials, the government proved McIntyre's conduct on both dates to establish the various elements of both tampering and stealing. We also note the Court's admonition in Brown v. Ohio, 432 U.S. 161, 169 (1977): "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." See also United States v. Pungitore, 910 F.2d 1084, 1110-11 (3d Cir. 1990) (discussing the auto stealing and joyriding prosecutions at issue in Brown as constituting a single course of conduct and distinguishing that case from those involving a continuous criminal enterprise), cert. denied, 111 S.Ct. 2010 (1991).

We therefore hold that the government's prosecution of McIntyre for stealing violated the Fifth Amendment's guarantee against double jeopardy. For the foregoing reasons, we reverse the judgment of the district court, and remand with instructions to grant the writ of habeas corpus.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. McINTYRE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 88-1708 C (2)
	)	
MYRNA TRICKEY, and	)	
WILLIAM L. WEBSTER,	)	
Attorney General,	)	
State of Missouri,[1]	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE

This cause is before the Court on the petition of Missouri state prisoner Terry D. McIntyre for a writ of habeas corpus under 28 U.S.C. §2254. This matter was referred to the undersigned United States Magistrate for review and a recommended disposition. 28 U.S.C. §636(b).

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[1]Because petitioner is challenging a sentence to be served in the future, William L. Webster, Attorney General for the State of Missouri, is a proper party respondent. 28 U.S.C. §2254, Rule 2(b). Myrna Trickey is a proper, but nominal, party respondent. Id.

In 1987, petitioner Terry D. McIntyre was convicted of first-degree tampering and stealing a motor vehicle by the Circuit Courts of the City of St. Louis and St. Louis County, respectively. He was sentenced to two ten-year terms of imprisonment, said sentences to run consecutively. Petitioner is presently incarcerated at the Missouri Eastern Correctional Center in Pacific, Missouri. Petitioner is herein challenging only his conviction and sentence for stealing a motor vehicle from the Circuit Court of St. Louis County; he does not challenge his first-degree tampering conviction from the Circuit Court of the City of St. Louis in the instant action. Petitioner's conviction and sentence from the Circuit Court of St. Louis County were affirmed on direct appeal. State of Missouri v. McIntyre, 749 S.W.2d 420 (Mo.App. 1988). (Resp. Exh. E.)

On September 2, 1988, petitioner filed the instant petition for a writ of habeas corpus. He asserts one ground for relief: his conviction for stealing a motor vehicle violates his Fifth Amendment right against double jeopardy. Specifically, petitioner argues that the evidence used against him in the prosecution of the tampering charge was also utilized to gain a conviction in the stealing charge. Petitioner contends that the tampering and stealing a motor vehicle offense[s] constitute the same offense.

In the direct appeal of his conviction for stealing a motor vehicle, petitioner raised the instant ground for federal habeas relief amongst several others. (Resp. Exh. C, at 4-5). Respondent concedes that this ground is exhausted. (Response to Order to Show Cause, at 3-4). Therefore, this ground may be addressed on the merits by this Court. Purnell v. Missouri Department of Corrections, 753 F.2d 703, 708 (8th Cir. 1985).

Petitioner relies upon Brown v. Ohio, 432 U.S. 161 (1977)[,] to support his argument that his right against double jeopardy was violated. In Brown, the defendant was arrested for "joy riding," pled guilty, and served a short jail sentence. Id., at 162-64. Upon his release, he was charged with automobile theft of the same vehicle. Under Ohio law the misdemeanor of "joy riding" was included in the felony of automobile theft. Id. The Supreme Court reversed the conviction on double jeopardy grounds even though the acts of theft and "joy-riding" occurred on different dates. Id., at 168-170.

Although petitioner argues that the facts of his case are identical to the facts of Brown, the undersigned concludes that they are not identical. Under Missouri law, tampering with a motor vehicle is not a lesser-included offense of stealing the same vehicle. State of Missouri v. McIntyre, supra, 749 S.W.2d at 422; State of Missouri v. Smith, 655 S.W.2d 626, 627-28 (Mo. App. 1983); State of Missouri v. Rivers, 663 S.W.2d 255, 256 (Mo. App. 1983); State v. Missouri v. Gobble, 675 S.W.2d 944, 948-49 (Mo. App. 1984); State of Missouri v. Souders, 703 S.W.2d 909, 911 (Mo. App. 1985). Furthermore, the Missouri Court of Appeals found that "the tampering was not a part of the stealing that had occurred two days earlier" for which petitioner was subsequently convicted and sentenced in the Circuit Court of the City of St. Louis. State of Missouri v. McIntyre, supra, 749 S.W.2d at 422.

This Court cannot reinterpret Missouri statutes after a finding of state law made by a state appellate court. Wilkerson v. Wyrick, 806 F.2d 161, 164 (8th Cir. 1986); Harkins v. Wyrick, 589 F.2d 387, 391 (8th Cir. 1979). Because tampering is not a lesser-included offense of stealing

a motor vehicle under Missouri law, the undersigned concludes that there is no violation of petitioner's right against double jeopardy.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned United States Magistrate that the petition of Terry D. McIntyre for a writ of habeas corpus be denied without further proceedings. The parties are advised that they have eleven (11) days to file written objections to this Report and Recommendation.

--David D. Noce----------
UNITED STATES MAGISTRATE

Signed this 2nd day of November, 1988.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. McINTYRE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-1708 C (2)
	)	
MYRNA TRICKEY, and	)	
WILLIAM L. WEBSTER,	)	
Attorney General,	)	
State of Missouri,	)	
	)	
Respondents.	)	

ORDER

This matter is before the Court on the petition of Terry D. McIntyre for a writ of habeas corpus. The matter was referred to United States Magistrate David D. Noce, who has filed his Report and Recommendation. 28 U.S.C. §636(b). Petitioner has objected thereto.

After consideration of this matter,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate is SUSTAINED and ADOPTED.

IT IS FURTHER ORDERED that the petition of Terry D. McIntyre for a writ of habeas corpus is DISMISSED.

Dated this 22nd day of November, 1988.

—Edward L. Filippine—
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. McINTYRE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-1708 C (2)
	)	
MYRNA TRICKEY, and	)	
WILLIAM L. WEBSTER,	)	
Attorney General,	)	
State of Missouri,	)	
	)	
Respondents.	)	

ORDER

This cause has been remanded to the undersigned for consideration of petitioner's motion to alter or amend judgment, filed December 2, 1988. 28 U.S.C. §636(b).

Petitioner's petition for a writ of habeas corpus argued that his conviction in the Circuit Court of St. Louis County was unconstitutional under the Double Jeopardy clause because of his prior conviction in the Circuit Court of the City of St. Louis. The petition was denied primarily because Missouri courts have held that tampering with a motor vehicle (City court conviction) is not a lesser-included offense of stealing the same vehicle (County court conviction).

Petitioner relied primarily on Brown v. Ohio, 432 U.S. 161 (1977)[,] in his original petition for a writ of habeas corpus. Although Brown arguably supports the theory petitioner advances in the current motion, factual distinctions between that case and this one made Brown relatively weak authority for his position. See, Brown, supra, 432 U.S. at 166-67 n.6.

The aspect of petitioner's argument which becomes clearer in the current motion is that while the lesser-included offense test is the appropriate test for Double Jeopardy violations involving multiple convictions in a single trial, his situation involved convictions imposed in successive prosecutions. He correctly argues that a different test should have been applied:

> Where the plea is against the imposition of cumulative sentences for multiple convictions obtained at a single criminal trial, double jeopardy's role is limited to assuring that the sentencing court does not exceed its legislative authorization by imposing more than one punishment for something the legislature has defined as a single crime. Brown [v. Ohio, supra], 432 U.S. at 165 . . .. In this context, the established test for determining whether two offenses are the "same" is that first set forth in Blockburger v. United States, 284 U.S. 299, 304 . . . (1932). The Blockburger test, which is essentially one of legislative intent, focuses on the formal elements of the two crimes, finding them to be different offenses if each

> requires proof of a fact which the other does not. Id.
>
> . . . The general test for determining whether successive prosecutions involve the "same offense" is . . . a more flexible and pragmatic one, which focuses not on the formal elements of the two offenses but rather on the proof actually utilized to establish them. Under this " same evidence" test, the second prosecution is barred by double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict of the second offense as charged.

United States v. Ragins, 840 F.2d at 1184, 1188 (4th Cir. 1988) (citations omitted); see United States v. Reiter, 848 F.2d 336, 341 (2nd Cir. 1988).

Under the latter test, which is applicable in this case, the appropriate inquiry is whether the evidence actually adduced at petitioner's first trial (for first-degree tampering) would have sufficed to support his subsequent conviction (for automobile theft). Although the record before this Court is insufficient to make such a determination, it appears that in petitioner's trial for tampering, the state introduced evidence tending to prove that petitioner had stolen the vehicle in question. The Missouri Court of Appeals ruled that such evidence was admissible on the ground that evidence linking petitioner with the theft of the car tended to establish his knowledge that he was operating the car without the consent of the owner, which was an element of the state's case in the tampering conviction. State of Missouri v. McIntyre, 735 S.W.2d 111, 112 (Mo. App. 1987).

It thus appears petitioner has set out a viable ground for granting the motion to amend or alter the judgment. However, since issues have been raised to which the respondent has not had the opportunity to respond, and since the trial records are not presently part of the record before the Court, this matter should be stayed pending submission of briefs and documentation by the parties.

In view of the above discussion,

IT IS HEREBY ORDERED that respondent file a response to petitioner's motion within twenty (20) days. Respondent shall include the records of petitioner's trials in her response. After respondent files her response, petitioner may have twenty (20) days thereafter to file a traverse with the Court. The Clerk of the Court shall provide respondent a copy of petitioner's December 2, 1988 motion to alter or amend judgment along with a copy of this order.

—David D. Noce—
UNITED STATES MAGISTRATE

Signed this 24th day of April, 1989.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. McINTYRE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-1708 C (2)
	)	
MYRNA TRICKEY, and	)	
WILLIAM L. WEBSTER,	)	
Attorney General,	)	
State of Missouri,	)	
	)	
Respondents.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE

This cause has been remanded to the undersigned United States Magistrate for consideration of the motion to alter or amend judgment filed by petitioner Terry D. McIntyre. 28 U.S.C. §636(b).

In his petition for a writ of habeas corpus, McIntyre argued that his conviction in the Circuit Court of St. Louis County was unconstitutional under the Double Jeopardy clause because of his prior conviction in the Circuit Court of the City of St. Louis. The petition was denied in part because Missouri courts have held that tampering with a motor vehicle (City court conviction) is not a lesser-included

offense of stealing the same vehicle (County court conviction).[1]

Petitioner relied primarily on Brown v. Ohio, 432 U.S. 161 (1977), in his original petition for a writ of habeas corpus. Although Brown arguably supports the theory petitioner advances in the current motion, factual distinctions between that case and this one made Brown relatively weak authority for his position. See, Brown, supra, 432 U.S. at 166-67 n.6. The aspect of petitioner's argument which becomes clearer in the current motion is that while the "lesser-included offense" test is the appropriate test for Double Jeopardy violations involving multiple convictions in a single trial, his situation involved convictions imposed in successive prosecutions. He correctly argues that a different test, the "same evidence" test, should have been applied. Under this "same evidence" test, the second prosecution is barred by the constitutional prohibition against double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict of the second offense as charged. United States v. Ragins, 840 F.2d 1184, 1188 (4th Cir. 1988) (citations omitted); see, United States v. Tercero, 580 F.2d 312, 314 (8th Cir. 1978); United States v. Reiter, 848 F.2d 336, 341 (2nd Cir. 1988).

Respondent's first argue that petitioner's motion to alter or amend the Court's judgment should be denied because petitioner is actually seeking to add a new claim to

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[1]The undersigned hereby adopts and incorporates the Report and Recommendation filed on November 2, 1988, and the Order filed on April 24, 1989, except as may be noted herein.

his petition. This, respondents contend, constitutes abuse of the writ. Furthermore, respondents claim that petitioner cannot demonstrate "cause" for his failure to assert the "new double jeopardy claim" in his initial petition. Respondents argue that petitioner failed to present this aspect of his double jeopardy claim to the state courts. Therefore, his claim is procedurally barred from federal habeas review absent a showing of cause and prejudice pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977). Finally, respondents argue that petitioner's claim is "facially frivolous" because the City of St. Louis and St. Louis County are two different sovereigns.

"A district court has broad discretion in ruling upon a Rule 60(b) motion . . .." Cox v. Wyrick, No. 88-2602, slip op. at 3 (8th Cir. April 26, 1989). Rule 60(b) relief is appropriate "where there are extraordinary circumstances, or where the judgment may work an extreme and undue hardship." Id., quoting, Mohammed v. Sullivan, 866 F.2d 258, 260 (8th Cir. 1989).

The undersigned concludes that petitioner's double jeopardy claim as now understood should be addressed by the Court so as to prevent an undue hardship to petitioner. Cox, supra, No. 88-2602, slip op. at 3. A pro se petitioner should not be held to the strict pleading requirements imposed upon attorneys especially where his initial petition generally invokes the basic constitutional protection he later alleges has been violated. See, e.g., Wallace v. Lockhart, 701 F.2d 719, 727 (8th Cir.), cert. denied, 464 U.S. 934 (1983); Hill v. Wyrick, 570 F.2d 748, 751-52 (8th Cir.), cert. denied, 436 U.S. 921 (1978); see also, Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam). The undersigned concludes that

petitioner is not attempting to add a new claim to his petition but rather clarifying his pro se arguments.

Respondents next argue that petitioner's "new double jeopardy claim" was not presented to the state courts and is thus subject to a procedural bar in this proceeding. In the direct appeal of his conviction for stealing a motor vehicle, petitioner raised a double jeopardy ground amongst several others. (Resp. Exh. C, at 4-5.) Although petitioner has now proposed a different (and correct) test for examining his ground, the constitutional basis of his claim has not changed after it was before the state courts. Petitioner has exhausted his federal habeas ground in the state courts, and it may therefore be addressed in this proceeding. Smittie v. Lockhart, 843 F.2d 295, 296 (8th Cir. 1988).

Finally, respondent[s] argue[] that petitioner's claim is frivolous and should be dismissed because he was tried and convicted by two different sovereigns -- the City of St. Louis and St. Louis County. Respondents contend that each jurisdiction was exercising its own sovereignty in prosecuting petitioner and that the Circuit Court of the City of St. Louis could not convict anyone of a crime which occurred in St. Louis County. This argument is without merit. The dual sovereignty doctrine provides that when a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the law of each, he has committed two distinct offenses for double jeopardy purposes. Heath v. Alabama, 474 U.S. 82, 88 (1985). In applying the doctrine, "the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the two entitles draw their authority to punish the offender from distinct sources of

power." Id. The dual sovereignty principle's application cannot be restricted to cases in which two prosecuting sovereigns can demonstrate that if only one of them is allowed to exercise jurisdiction over the defendant, the second one's "legitimate interests" will not be vindicated. If the prosecuting entities are separate sovereigns, the circumstances of the case and the particular "interests" of each are not relevant to the other. Id., at 91-92.

The circuit courts of Missouri are granted jurisdiction over felony trials by the State of Missouri. Mo. Const., Art. V, §14(a); R.S.Mo. §542.020 (1986). Thus, circuit courts for the City of St. Louis and St. Louis County "draw their authority to punish the offender" from the same source of power. Heath, supra, 474 U.S. at 88. These local governmental entities cannot be considered separate sovereigns for double jeopardy purposes. Id.; Waller v. Florida, 397 U.S. 387, 394-95 (1970). The double jeopardy clause bars successive prosecutions by a local government and a state in which it is located or by two local governments in the same state. Heath, supra, 474 U.S. at 88; Waller, supra, 397 U.S. at 395; Brown v. Ohio, supra, 432 U.S. at 169.

Turning to the merits of petitioner's federal habeas ground, it is again recognized that the appropriate inquiry is whether the evidence actually adduced at petitioner's first trial (for first-degree tampering) would have sufficed to support his subsequent conviction (for automobile theft). Ragins, supra, 840 F.2d at 1188; see Tercero, supra, 580 F.2d at 314. The record before the Court now includes the transcript and legal file of petitioner's conviction in the City of St. Louis as well as the transcript of petitioner's trial in St. Louis County. (Supplemental exhibits filed May 12, 1989).

At the petitioner's trial for automobile tampering in the City of St. Louis, the prosecution witnesses included the arresting police officers (O'Toole and Harnak) and the general manager and salesman of the automobile dealership from which the vehicle at issue was stolen (Naughton and George). (Transcript, Vol. I and II.) Evidence was introduced regarding petitioner's arrest on November 24, 1985 for auto tampering in the City of St. Louis. (Id., Vol. II, at 180-293.) This testimony clearly established that petitioner was operating the automobile in question. (Id.) Further testimony was received regarding petitioner's visit to the automobile dealership on November 22, 1985. (Id., at 294-350.) This evidence established that petitioner had visited the automobile dealership, taken a test drive in the vehicle with a salesman and departed the dealership shortly thereafter. Testimony was also given to the effect that petitioner had the opportunity to provide a different set of keys to the salesman and that after petitioner's departure, the vehicle was missing from the dealership. (Id.)

The defense introduced testimony by Betty Wehmeyer, the records officer at St. Mary's Honor Center where petitioner then resided. (Id., at 351-379.) Her testimony and Honor Center records established that petitioner's whereabouts were accounted for at the time he was allegedly at the automobile dealership. (Id.) Petitioner also testified regarding his activities on the dates of November 22, 23 and 24, 1985. (Id., at 380-436.) Petitioner stated that he never visited the dealership and was at the Honor Center at the time he allegedly took a test drive and when the automobile was noticed as missing. (Id.)

The jury was given the following instruction (among others) to guide its deliberations:

If you find and believe from the evidence beyond a reasonable doubt:

First, that on November 24, 1985, in the City of St. Louis, State of Missouri, the defendant knowingly operated a certain automobile, a 1986 Mitsubishi Galant, owned by Kirkwood Mitsubishi, and

Second, that he operated the automobile without the consent of the owner, and

Third, that he operated knowing that he did so without the consent of the owner,

then you will find the defendant guilty of tampering in the first degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, then you must find the defendant not guilty of that offense.

[Instruction No. 6, in accordance with MAI-CR 23.21, Resp. Exh. "Legal File" on appeal to the Missouri Court of Appeals, Eastern District, in Cause No. 51915, at 40.) The jury returned a verdict of guilty in accordance with this instruction. (Id., at 44.)

At petitioner's trial for automobile theft, the prosecution again presented the testimony of the dealership

general manager and the salesman (Naughton and George). (Resp. Exh. A, at 20-38, 55-63.) Their testimony was essentially the same as that presented at petitioner's trial for automobile tampering. Officer O'Toole also testified and his testimony was also essentially the same as that given during the earlier trial albeit less detailed in some respects. (Id., at 39-44.) Finally, officer Jack Schneedle of the Kirkwood, Missouri Police Department testified about the photographic display he presented, after petitioner's arrest for automobile tampering, to the automobile dealership personnel. Petitioner was identified as the suspected automobile thief. (Id., at 44-54.) Officer Schneedle also testified as to the distances between the automobile dealership and the general area of St. Mary's Honor Center (where petitioner resided). (Id.)

Finally, petitioner testified at his second trial. (Id., at 124-142.) He stated that he never visited the dealership on the date in question and that, in fact, he had left his school assignment that date and returned directly to the Honor Center, arriving there before he allegedly departed from the automobile dealership. (Id.) The defense attempted to buttress petitioner's testimony with the testimony of Lewis Baring, chief of custody at St. Mary's Honor Center, and Eldon Gravett, a former correctional officer at the Center. (Id., at 64-123.) These witnesses explained the Center's procedures for accounting for each inmate throughout the Center's daily routine and explained the Center's records on petitioner's whereabouts for November 22, 1985 between the hours of 9:00 a.m. and 10:00 p.m. (Id.)

The jury at this trial was given the following instruction (among others) to guide its deliberations:

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 22, 1985, in the County of St. Louis, State of Missouri, the defendant took a 1986 Mitsubishi automobile, property owned by Kirkwood Mitsubishi, and

Second, that defendant did so without the consent of Kirkwood Mitsubishi, and

Third, that defendant did so for the purpose of withholding it from the owner permanently, and

Fourth, that the property taken was an automobile,

then you will find the defendant guilty of felony stealing.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

If you do find the defendant guilty of felony stealing, you will return a verdict finding him guilty of felony stealing.

[Resp. Exh. B, at 28.) The jury returned a verdict of guilty in accordance with this instruction. (Id., at 33.)

After a review of the record, the undersigned concludes that the evidence adduced at petitioner's first trial (for first-degree tampering) could not have sufficed to support his subsequent conviction for automobile theft. Ragins, supra, 840 F.2d at 1188; see, Tercero, supra, 580 F.2d at 314. Specifically, there was insufficient evidence presented at petitioner's first trial to demonstrate that petitioner was able to be present at the Kirkwood automobile dealership at the approximate time attested to by Naughton and George and to return to St. Mary's Honor Center in time to be counted as present in the Center's records by the evening "count." The travel time testimony of Officer Schneedle is critical in this regard. Indeed, the St. Louis County trial court recognized that whether petitioner was present at the automobile dealership on November 22, 1985, at approximately 4:00 p.m., was a critical issue at petitioner's trial for auto theft (unlike his earlier trial for tampering.) The court gave the following instruction:

> One of the issues in this case is whether the defendant was present at 1040 North Kirkwood Road, in the City of Kirkwood, in the County of St. Louis, State of Missouri, on November 22, 1985, at approximately 4:00 p.m. On that issue you are instructed as follows:
>
> 1. The state has the burden of proving beyond a reasonable doubt that the defendant was present at the time and place the offense is alleged to have been committed.
>
> 2. If the evidence in this case leaves in your mind a reasonable doubt that

> the defendant was present at 1040 North Kirkwood Road, in the City of Kirkwood, in the County of St. Louis, State of Missouri, on November 22, 1985, at approximately 4:00 p.m., then you must find the defendant not guilty.

(Resp. Exh. B, at 30.) The testimony of Officer Schneedle regarding the time required to travel from the Kirkwood automobile dealership to the general area of St. Mary's Honor Center provided the jury a reasonable basis on which to find that defendant was present at the automobile dealership at approximately 4:00 p.m. on November 22, 1985, as Naughton and George alleged. Furthermore, the testimony of Baring and Gravett further detailed the procedures at St. Mary's Honor Center in accounting for inmates. From this evidence, a jury could reasonably find that petitioner did indeed visit the dealership and return to the Center in time to be counted "present" at the next "count" of inmates.

The foundation of petitioner's double jeopardy is his claim that the same evidence was used to convict him in his trial for automobile theft as was used in his earlier trial for automobile tampering. As noted, some of the evidence was presented at both trials. It appears to the undersigned that this "overlapping" was the result of the prosecution's attempt in the first trial to demonstrate that petitioner had knowledge that the automobile in which petitioner was apprehended was stolen. Petitioner then presented evidence of his whereabouts at the time and date of his alleged visit to the automobile dealership to rebut the prosecution's evidence of the "knowingly" element of the automobile tampering charge. However, despite this use of some evidence at both trials, the undersigned concludes that the evidence submitted at

petitioner's trial for automobile tampering was legally insufficient to convict him of automobile theft. In sum, the undersigned concludes that petitioner's motion to alter or amend the Court's judgment should be denied.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned United States Magistrate that the motion of Terry D. McIntyre to alter or amend the judgment previously entered in this cause be denied. The parties are advised that they have eleven (11) days in which to file written objections to this Report and Recommendation.

—David D. Noce—————
UNITED STATES MAGISTRATE

Signed this 7th day of August, 1989.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. McINTYRE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-1708 C (2)
	)	
MYRNA TRICKEY, and	)	
WILLIAM WEBSTER,	)	
Attorney General,	)	
State of Missouri,	)	
	)	
Respondents.	)	

ORDER

This matter is before the Court on the petitioner's motion to alter or amend judgment. The matter was referred to United States Magistrate David D. Noce, who has filed his Report and Recommendation. 28 U.S.C. §636(b). Petitioner has objected thereto.

After careful consideration of this matter,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate is SUSTAINED and ADOPTED.

IT IS FURTHER ORDERED that petitioner's motion to alter or amend the judgment previously entered in this cause is DENIED.

Dated this 18th day of September, 1989.

—Edward L. Filippine—
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. McINTYRE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-1708 C (2)
	)	
MYRNA TRICKEY, and	)	
WILLIAM WEBSTER,	)	
Attorney General,	)	
State of Missouri,	)	
	)	
Respondents.	)	

MEMORANDUM AND ORDER

This matter is before the Court on petitioner's motion for a certificate of probable cause and request to proceed in forma pauperis on appeal.

By order dated November 22, 1988, this Court dismissed the petition of Terry D. McIntyre for writ of habeas corpus. And, by order dated September 18, 1989, this Court denied petitioner's motion to alter or amend the order of November 22, 1988.

In order to obtain a certificate of probable cause petitioner "'must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further."' Gordon v.

Willis, 516 F.Supp. 911, 913 (N.D.Ga. 1980) (quoting United States ex rel. Jones v. Richmond, 245 F.2d 234 (2d Cir.), cert. denied, 355 U.S. 846 (1957)." Barefoot v. Estelle, 463 U.S. 880, 893 n. 4 (1983). After reviewing petitioner's writ of habeas corpus and his motion to alter or amend the Court concludes that reasonable jurists could not differ on the conclusion that the evidence submitted at petitioner's trial in the Circuit Court of the City of St. Louis for automobile tampering was insufficient to convict him of automobile theft and thus the trial in the Circuit Court of St. Louis County for stealing a motor vehicle was not double jeopardy. Accordingly, the Court will deny petitioner's motion for a certificate of probable cause.

Because it appears that petitioner is indigent, however, the Court will grant petitioner's motion to proceed on appeal in forma pauperis.

Accordingly,

IT IS HEREBY ORDERED that petitioner's motion for a certificate of probable cause is DENIED.

IT IS FURTHER ORDERED that petitioner's request to proceed in forma pauperis on appeal is GRANTED.

Dated this 17th day of October, 1989.

—Edward L. Filippine—
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 89-2700EM

TERRY D. McINTYRE,	)	
	)	
Appellant,	)	Appeal from the
	)	United States
v.	)	District Court for
	)	the Eastern
MYRNA TRICKEY,	)	District of
	)	Missouri
Appellee.	)	

This appeal from the United States District Court for the Eastern District of Missouri comes before the Court on consideration of an application for certificate of probable cause to appeal. In connection with the application, the Court has carefully examined the file of the District Court in case number 88-1708 C(2). Being fully advised in the premises, it is ordered by the Court that the application for certificate of probable cause be granted.

It is further ordered that the Clerk of this Court is directed to appoint John Davidson of St. Louis, Missouri, to represent the appellant herein under the terms of the Criminal Justice Act.

May 7, 1990
Order entered at the direction of the Court

--Robert D. St.Vrain--

Clerk, U.S. Court of Appeals, 8th Circuit.

STATE of Missouri, Respondent,
v.
Terry D. McINTYRE, Appellant.
No. 51914.

Missouri Court of Appeals,
Eastern District,
Division One.

June 30, 1987.

SATZ, Presiding Judge.

Defendant Terry D. McIntyre was convicted by a jury of tampering in the first degree, § 569.080, RSMo. 1986, and was sentenced as a persistent offender to ten years imprisonment. Defendant appeals. We affirm.

On November 22, 1985, defendant went to Kirkwood Mitsubishi and asked to test drive a Mitsubishi Galant. Defendant was left alone in the showroom for approximately two minutes while the salesman went to get the keys to the Galant. During this time, defendant was looking at the interior of a car on the showroom floor. This car had its keys in its ignition, and those keys were similar to the keys to the Galant.

After defendant test drove the Galant, he gave the salesman a set of Mitsubishi keys. The salesman placed the keys on a board where they were normally kept. Shortly thereafter, the salesman discovered the Galant was missing and also discovered the keys on the board were to the showroom car defendant had been looking at, not the Galant.

The salesman reported the missing Galant to the Kirkwood police.

Two days later, police saw defendant driving the Galant, which was listed on a "hot sheet" of stolen cars. After chasing the car for approximately eight blocks, police stopped the car and arrested defendant. Defendant testified at trial he had borrowed the car from a friend.

Defendant makes two arguments on appeal. Neither has merit. First, defendant argues it was error to allow the introduction of evidence showing defendant may have stolen the Galant. Defendant argues the prejudicial effect of this evidence outweighed its probative value. We disagree.

Generally, evidence of other crimes is inadmissible unless it has some legitimate tendency to establish defendant is guilty of the crime charged. *State v. Shaw*, 636 S.W.2d 667, 672 (Mo. banc 1982). Thus, this evidence may be admissible when it tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or identity. *State v. Trimble*, 638 S.W.2d 726, 732 (Mo. banc 1982); *State v. Caldwell*, 695 S.W.2d 484, 486 (Mo.App.1985).

As an element of its case, the State was required to prove defendant knew he was operating the car without the consent of the owner. The evidence linking defendant with the theft of the car tended to establish this knowledge on the part of defendant and thus was relevant. *See, e.g. State v. Remspecher*, 542 S.W.2d 24, 25 (Mo.App.1976). The key question is whether the relevancy of this evidence is outweighed by its possible prejudicial effect. *Caldwell, supra* at 484. The decision whether the potentially prejudicial effect

of evidence outweighs its probative value is within the sound discretion of the trial court. *Shaw, supra* at 672. The trial court here properly exercised its discretion in admitting the evidence.

Defendant also argues the trial court erred in rejecting his proffered instruction on the use of prior convictions to impeach his testimony. The 3.00 series of MAI-CR2d has two instructions relating to the use of prior convictions for impeachment: 3.56 entitled "Impeachment of a Witness Other Than Defendant by Prior Offenses" and 3.58 entitled "Impeachment of Defendant by Conviction of 'Unrelated Crimes' Shown Solely for the Purpose of Impeachment". Defendant requested the trial court use MAI-CR2d 3.56 to instruct the jury on the prosecutor's use of prior convictions to impeach defendant's testimony. The trial court properly refused to do so.

The proper instruction to be given when the defendant's testimony has been impeached with prior convictions is MAI-CR2d 3.58. MAI-CR2d 3.58 Notes on Use, note g; *State v. Williams*, 632 S.W.2d 266 (Mo.App.1982). Whenever there is an MAI-CR instruction applicable under the law to the facts, the MAI-CR instruction must be given to the exclusion of any other on the same subject. Rule 28.02(c); *State v. Morris*, 639 S.W.2d 239, 240-241 (Mo.App.1982). Defendant argues he would be prejudiced by the use of MAI-CR2d 3.58 over MAI-CR2d 3.56, because MAI-CR2d 3.58 explicitly lists the prior offenses used to impeach. This argument has been made and rejected. *Williams, supra* at 266. If the prior convictions have already been elicited on cross-examination, we do not see how defendant can be prejudiced by a reference to them in an instruction.

Moreover, instructions in the 3.00 series of MAI-CR2d are required to be given only if requested. Rule 28.02(a). Defendant did not request instruction MAI-CR2d 3.58. According to the prosecutor's statement on the record, the trial court offered to give MAI-CR2d 3.58 and the defendant refused this offer. The trial court agreed with the prosecutor's characterization of the events at the instruction conference. If defendant refused MAI-CR2d 3.58, the trial court was under no obligation to substitute an alternative instruction. *Williams, supra* at 266. *See also Morris, supra* at 241.

Judgment affirmed.

CRIST and KELLY, JJ., concur.

STATE of Missouri,

Plaintiff-Respondent,

v.

Terry D. McINTYRE,

Defendant-Appellant.

No. 53084.

Missouri Court of Appeals,
Eastern District,
Division One.

Feb. 16, 1988.

REINHARD, Judge.

Defendant was found guilty by a jury of stealing a motor vehicle and sentenced by the court as a persistent offender to a term of 10 years' imprisonment to be served consecutively to an existing 10-year sentence. He appeals; we affirm.

On November 22, 1985, a man who identified himself as "Johnny" went to Kirkwood Mitsubishi and told salesman Steven George he wanted to test drive a Mitsubishi Galant. While George went to get the keys to a Galant demonstrator, "Johnny" was left alone to look at a Galant on the showroom floor. The showroom car had its keys in its ignition, and those keys were similar to the keys to the demonstrator Galant.

After a test drive, "Johnny" returned a set of Galant keys to George who returned them to the dealership "key board." About 15 minutes later, George and another salesman discovered the demonstrator Galant was missing and the keys on the board were from the showroom Galant at which "Johnny" had been looking, not the demonstrator. Two days later, St. Louis city police officers saw the Galant, which was listed on a "hot sheet" of stolen cars. After a pursuit, police officers stopped the Galant and arrested defendant, who was driving, and a passenger. There was a set of keys in the vehicle's ignition.

Jack Schneedle, a Kirkwood police officer, prepared a photo array to show to automobile salesman George. Two of the photos, obtained from the St. Louis Police Department, were of defendant and the passenger arrested with him; three were from the Kirkwood Police Department files. On November 27, 1985, Detective Schneedle took the five photographs to the Kirkwood Mitsubishi dealership, showed them to George, and asked him if any of the photos were of the person who was in the dealership and took a ride in the demonstrator Galant on November 22, 1985. Schneedle did not tell George anything else. George identified the photograph of defendant as "Johnny."

On December 19, 1985, defendant was charged with first degree tampering for operating the Galant in the city of St. Louis. He was found guilty by a jury on June 5, 1986, and sentenced July 11, 1986, by the court as a prior and persistent offender to 10 years' imprisonment. We affirmed his tampering conviction on appeal. *State v. McIntyre*, 735 S.W.2d 111 (Mo.App.1987).

On August 9, 1986, defendant was charged with stealing the Galant based on his alleged appropriation of it from Kirkwood Mitsubishi. His motion to dismiss the stealing charge, based on a claim of double jeopardy, was denied February 23, 1987.

At defendant's trial on the stealing charge, automobile salesman George identified the photograph of defendant that he had previously identified for Detective Schneedle. George also identified defendant in court as "Johnny," the person who test drove the Galant that later was stolen. Defendant also was identified in court by the St. Louis police officer who arrested him while driving the Galant and the general manager of Kirkwood Mitsubishi. On the date of the theft, defendant approached the general manager in the dealership building and inquired about a Mitsubishi Galant on the parking lot. The manager directed defendant to the showroom floor and later saw him briefly in the new car showroom.

On appeal, defendant contends the trial court erred in failing to sustain his motion to dismiss "on grounds of prior jeopardy in that [defendant] had already been previously tried and convicted of unlawfully operating the vehicle he was charged in this case with stealing."

Defendant relies primarily on *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). We believe *Brown* supports the result we have reached. In *Brown*, the defendant was arrested on December 8, 1973, while driving a stolen car. He was charged with "joyriding," pled guilty, and served a 30-day jail sentence. After his release from jail, he was charged with the November 29, 1973, theft of the automobile. The trial court overruled his double jeopardy

objection and the Ohio Court of Appeals affirmed. In its opinion, the Ohio appellate court stated its conclusion that, under Ohio law, the misdemeanor of joyriding was included in the felony of auto theft; however, it held the second prosecution permissible because the theft occurred on November 29 and the joyriding on December 8. *Brown*, 432 U.S. at 162-64, 97 S.Ct. at 2223-24, 53 L.Ed.2d at 192-93. Relying on the Ohio Court of Appeals' interpretation of the Ohio statutes, the United States Supreme Court reversed the conviction on double jeopardy grounds. *Id.* at 168-70, 97 S.Ct. at 2226-27, 53 L.Ed.2d at 195-97.

Here, defendant asks us to overrule a long line of Missouri opinions that hold that tampering with a motor vehicle is not a lesser included offense of stealing the same vehicle. In his brief, defendant states as follows:

> The Ohio Court of Appeals had earlier held that the crime of joyriding was included in the offense of auto theft. Missouri courts have developed a different interpretation, holding that joyriding or "tampering" is *not* a lesser included offense of auto theft. This is contrary to the definitions of the respective offenses and the meaning of "lesser included offense."
>
> . . . .
>
> The statutes involved in the *Brown* case are virtually identical to the Missouri Statutes for tampering and stealing a motor vehicle. (Citations omitted.)

We recognize that our courts have interpreted the Missouri stealing and tampering statutes differently from the Ohio court's interpretation of Ohio law. In *Brown*, however, the United States Supreme Court recognizes that state courts "have the final authority to interpret . . . that State's legislation," and the Court's ruling was based on the Ohio court's determination that, under Ohio law, joyriding is a lesser included offense of auto theft. The Missouri Court of Appeals, Western District, faced this issue in *State v. Smith*, 655 S.W.2d 626 (Mo.App.1983), and concluded that auto tampering is not a lesser included offense of auto theft. We have consistently followed the western district's view.[1] *Smith* and our opinions that follow it were published subsequent to *Brown*, and we see no reason to deviate from this precedent.

We recognize, as did Justice Blackmun in his dissenting opinion in *Brown*, that the appropriation and operation of an automobile could be "so closely connected in time" that they would constitute only one offense. *Brown*, 432 U.S. at 171, 97 S.Ct. at 2228, 53 L.Ed.2d at 198. Here, however, the tampering was not a part of the stealing that occurred two days earlier. Had defendant been charged with stealing and tampering based solely on his driving the Galant

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[1]*See State v. Rivers*, 663 S.W.2d 255 (Mo.App.1983); *State v. Gobble*, 675 S.W.2d 944 (Mo.App.1984); *State v. Souders*, 703 S.W.2d 909 (Mo.App.1985). Our supreme court denied applications to transfer in *Smith, Rivers*, and *Gobble*.

from the dealership parking lot, then we believe his conduct would constitute only one offense.[2]

Defendant also alleges the trial court erred in failing to sustain his motion to suppress identification of his photograph by automobile salesman George and George's in-court identification. He argues that, because none of the four other photographs showed a man with a similar hair style, the circumstances were "inherently suggestive and conducive to mistaken identification."

We have carefully reviewed the record and concluded that, based on the totality of the circumstances, Detective Schneedle was not impermissibly suggestive in his conduct of the photo identification session with George. *See State v. Higgins*, 592 S.W.2d 151, 159-60 (Mo. banc 1979), *appeal dismissed*, 446 U.S. 902, 100 S.Ct. 1825, 64 L.Ed.2d 254 (1980). Moreover, George's in-court identification of defendant was reliable under the totality of the circumstances test of *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). *See Higgins*, 592 S.W.2d at 160.

Judgment affirmed.

GARY R. GAERTNER, P.J., and CRIST, J., concur.

---

[2]We note that defendant, at his trial on the tampering charge, objected to evidence that he stole the Galant, seeking to exclude it as evidence of another crime. In ruling on this complaint, we treated the stealing as a separate offense from the tampering. *McIntyre*, 735 S.W.2d at 112.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2700EMSL

TERRY D. McINTYRE,	*	
	*	
Appellant,	*	Order Denying Petition
	*	for Rehearing and
v.	*	Suggestion for Rehearing
	*	En Banc
MYRNA TRICKEY,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

November 23, 1994

Order Entered at the Direction of the Court:
—Michael E. Gans—
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2700EMSL

TERRY D. McINTYRE,	*	
	*	
Appellant,	*	Appeal from the United States District Court for the Eastern District of Missouri
	*	
v.	*	
	*	
MYRNA TRICKEY,	*	
	*	
Appellee.	*	

Appellee's motion to certify question to the Supreme Court of Missouri has been considered by the Court and is denied.

December 22, 1994

Order Entered at the Direction of the Court:
---Michael E. Gans--
Clerk, U.S. Court of Appeals, Eighth Circuit

PETITION UNDER 28 USC § 2254
FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
_____ DIVISION

Name: Terry McIntyre

Prisoner No. 44126
Case No. 88-1708-C-2

Place of Confinement: Missouri Eastern Correctional Center

Name of Petitioner
Terry D. McIntyre

Name of Respondent
v. Myrna Trickey

The Attorney General of the State of:
Missouri William Webster

PETITION

1. Name the location of court which entered the judgment of conviction under attack: St. Louis City Circuit Court, St. Louis County Circuit Court.

2. Date of judgment of conviction: June 5, 1986, May 1987.

---

[1]Respondent filed his petition on a model form. Questions from the form are in ordinary type. Respondent's answers and the unanswered questions on the form are shown with an underline.

3. Length of sentence: Consecutive Sentences of 10 years and 10 years.

4. Nature of offense involved (all counts): St. Louis city, Tampering First Degree, St. Louis County, Stealing an Auto, both convictions resulting from the same offense.

5. What was your plea? (Check one)
   (a) Not guilty [X]
   (b) Guilty [ ]
   (c) Nolo Contendere [ ]

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

---

6. If you pleaded not guilty, what kind of trial did you have: (Check one)
   (a) Jury [X]
   (b) Judge only [ ]

7. Did you testify at the trial?

   Yes [X] No. [ ]

8. Did you appeal from the judgment of conviction?

   Yes [X] No. [ ]

9. If you did appeal, answer the following:
   (a) Name of court: Missouri Court of Appeals, Eastern District.
   (b) Result: Affirmed.

(c) Date of result: Feb. 16,1988, 744 S.W.2d 894, (Mo. app.1988)

(d) Grounds raised: Double Jeopardy

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court: Missouri Supreme Court.

(2) Result: Application to Transfer, Denied.

(3) Date of result and citation, if known: May 17,1988

(4) Grounds raised: Double Jeopardy

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court: Not Applied

(2) Result: _____

(3) Date of result and citation, if known: _____

(4) Grounds raised: _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to the judgment in any court, state or federal?
Yes [X] No. [_]

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: St. Louis County Circuit Court

(2) Nature of proceeding: 29.15 Motion, Post-Conviction Relief

(3) Grounds raised: Ineffective Assistance of Counsel

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [_] No. [_]

(5) Result: Pending Disposition

(6) Date of result: _____

(b) As to any second petition, application or motion[,] give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [_] No. [_]

(5) Result: _____

(6) Date of result: _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.
Yes [_] No. [_]

(2) Second petition, etc.
Yes [_] No. [_]

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to his conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the chart and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: SEE ATTCHED

Supporting FACTS (tell your story *briefly* without citing cases or law): SEE ATTCHD

Attached Information to A, Ground One.

A. Ground One. The State of Missouri violated petitioners rights under the double jeopardy clause, of the 5th Amendment, in that: The evidence used by the State of Missouri in prosecuting the first offense, Tampering First Degree, was also used to sustain a conviction in the second offense, Stealing a Motor Vehicle, in violation of Brown vs.O hio, 432 U.S. 161, 97 S. Ct. 2221, 53 L.Ed.2d 187 (1977).

The principle question is this case is whether Auto Theft and Tampering First Degree, constitute the"SAmeO offense" under the Double Jeopardy Clause. In Re Nielsen,131 U S '176, 9 S. Ct. 672, 33 L.Ed.118 (1889).

Supporting Facts: On December 19,1985, petitioner was charged with first degree tampering for operating a stolen motor vehicle; and he was subsequently found guilty by a jury on June 5,1986. Thereafter, on August 9, 1986, petitioner was again charged with stealing the same motor vehicle based on his alleged appropriation of it from the dealership. The evidence relied on by the State to convict petitioner at his first trail for first degree tampering was the exact same evidence - relied on by the State to convict petitioner at his subsequent trail for stealing the same motor vehicle. The State also used the same - witnesses at the first and second trail. It is without question that the evidence required to warrant a conviction upon petitioner's first - prosecution would have been sufficient to support his conviction upon the subsequent prosecution for stealing the same motor vehicle that he had earlier been convicted of for first degree tampering for operating the same motor vehicle.

Petitioner maintains that the City of St. Louis and St. Louis County prosecutions must be viewed as the acts of a single sovereign under the double jeopardy clause.

Conclusion: For This reason, the Court should grant the petition for writ of Habeas Corpus to establish and clarify the standards by which the Missouri Courts interpret a clear violation of the fifth(5th) and fourteenth (14th) Amendments to the United States Constitution.

Respectfully,

--Terry D. McIntyre--
Terry McIntyre Petitioner

B. Ground two: _____

Supporting FACTS (state *briefly* without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (state *briefly* without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (state *briefly* without citing cases or law): _____

13. If any of the ground listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes [X] No. [_]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Mr. Paul Madison, No. 35261, St. Louis County Public Defenders Office.

(b) At arraignment and plea: _____

(c) At trial: Same

(d) At sentencing: Same

(e) On appeal: Same

(f) In any post-conviction proceeding: _____

(g) On appeal from any adverse ruling in a post-conviction proceeding: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes [ ] No. [X]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes [ ] No. [X]

(a) If so, give name and location of court which imposed sentence to be served in the future:

_____

(b) Give date and length of the above sentence:

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes [ ] No. [ ]

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in his proceeding.

_____
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on 8/5/88
(date)

--Terry D. McIntyre--
Signature of Petitioner

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. McINTYRE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-1708C (2)
	)	
MYRNA TRICKEY,	)	
	)	
Respondent.	)	

MOTION TO ALTER OR AMEND JUDGMENT

Comes now petitioner, Terry D. McIntyre, pro se, and pursuant to Fed.R.Civ.P. 59(e), and would respectfully move the Court to alter or amend its judgment entered in the above-entitled cause and for his cause of action states as follows:

1. That, on November 22, 1988, the Court sustained and adopted the Report and Recommendation of the United States Magistrate and dismissed petitioner's petition for a writ of habeas corpus in the above-entitled cause.

2. That this pro se motion to alter or amend the Court's judgment in the above-entitled cause is served not later than 10 days after entry of the judgment and is timely filed.

3. That the petitioner would respectfully reiterate to the Court that the findings of the United States Magistrate, which the court has sustained and adopted, having totally,

either through inadvertence or oversight, misconstrued petitioner's double jeopardy argument advanced in his petition for a writ of habeas corpus.

4. The U.S. Magistrate stated that the "/p/etitioner contends that the tampering and stealing a motor vehicle offense constitute the same offense." (U.S. Magistrate's Report and Recommendation, p. 2) (emphasis added). The Magistrate went on to conclude that "/u/nder Missouri law, tampering with a motor vehicle is not a lesser-included offense of stealing the same vehicle." Id. at 3. In addition to these findings, the U.S. Magistrate noted that "the Missouri Court of Appeals found that 'the tampering was not a part of the stealing that had occurred two days earlier' for which petitioner was subsequently convicted and sentenced in the Circuit Court of the City of St. Louis." Ibid.

5. These findings by the U.S. Magistrate totally overlook that it is not a question as to whether the tampering and stealing a motor vehicle offense[s] constitute the "same offense" under Missouri law, but whether these offense constitute the "same offense" for double jeopardy purposes is the question to be answered. Cf. Jordan v. Com. of Va., 653 F.2d 870 (4th Cir. 1980). In the instant case, as was the case in Jordan, the evidence necessarily used by the State in prosecuting the earlier first-degree tampering charge would totally have sufficed to sustain the later stealing a motor vehicle charge. Thus, the evidence required to warrant a conviction upon the first-degree tampering charge would have been sufficient to support a conviction upon the stealing a motor vehicle charge. Therefore, under the standard enunciated by the United States Supreme Court in In re Nielsen, 131 U.S. 176, 188, 9 S.Ct. 672, 33 L.Ed. 118 (1889), the second prosecution was barred because the "same

evidence" would have sufficed to gain a conviction on either charge.

6. Petitioner would respectfully submit to the Court that the "actual-evidence" test employed and relied on in In re Nielsen, supra, rather than the "same offense" test employed in Brown v. Ohio, 432 U.S. 161 (1977) and relied on by the U.S. Magistrate and this Court, should have been used to decide petitioner's double jeopardy claim in the instant case. See also Illinois v. Vitale, 447 U.S. 410, 419-21, 100 S.Ct. 2260, 2267, 65 L.Ed.2d 228 (1980).

7. In the instant case, the Court should examine the actual evidence presented at both of petitioner's trials in the State courts. Had the Court examined petitioner's double jeopardy claim in this posture, under In re Nielsen, supra, the Court's conclusion may have been different.

WHEREFORE, for the reasons so stated herein, petitioner prays that the Court alter or amend its judgment entered in the above-entitled cause and grant such other and further relief it deems just and proper in the premises.

Dated this 30th day of November, 1988.

Respectfully submitted,

--Terry D. McIntyre--
Terry D. McIntyre
Reg. No. 44126
MECC, 11B-16
18701 Old Highway 66
Pacific, Mo 63069
pro se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was mailed postage prepaid, this 30th day of Nov., 1988, to:

Stephen D. Hawke
Asst. Attorney General
P. O. Box 899
Jefferson City, MO 65102

--Terry D. McIntyre--
TERRY. D. McINTYRE

MISSOURI CIRCUIT COURT -
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

STATE OF MISSOURI DIV # CA# P27315 CAUSE # 851-2866
VS
RACE N DOB 07/19/60 CK IF AT LARGE-
SUPPRESSED-

MCINTYRE, TERRY D
DEFENDANT
SEX M AR# 85-9-02978 HO 1548 PAPIN
ADD ST. LOUIS MO

ALIASES AGE 25 CN 85-145272 ZIP
HT 5'8 ID# 000178827 BUS
ADD
DEF LTR - WT 139 SS# ZIP

CHARGES(S):

TAMPERING FIRST DEGREE (CLASS C FELONY)

WITNESSES:
NAUGHTON, JAKE
GEORGE, STEPHEN
HORNAK, KENNETH
1797 309
OTOOLE, LAWRENCE
2202 309

STATE OF MISSOURI)
CITY OF ST. LOUIS) SS

INDICTMENT

The Grand Jurors of the City of St. Louis, State of Missouri, charge that the defendant, in violation of Section 569.080.1(2), RSMo, committed the class C felony of tampering in the first degree, punishable upon conviction under Sections 558.011.1(3) and 560.011, RSMo, in that on the 24th day of November, 1985, in the City of St. Louis, State of Missouri, the defendant knowingly and without the consent of the owner operated an automobile: a 1986 maroon Mitsubishi license # D183H..

A true bill

--Linda Jokerst--
Foreman

GEORGE A. PEACH
Circuit Attorney
of the City of St. Louis,
State of Missouri, by
--Robert Gerrison--
Assistant Circuit Attorney

Received and filed 12/19/85 and bail set at $ 5000 sec.

--Jean c. Hamilton--
Circuit Judge

Instruction No. 6

If you find and believe from the evidence beyond a reasonable doubt:

First, that on November 24, 1985, in the City of St.Louis, State of Missouri, the defendant knowingly operated a certain automobile, a 1986 Mitsubishi Galant, owned by Kirkwood Mitsubishi and

Second, that he operated the automobile without the consent of the owner, and

Third, that he operated knowing that he did so without the consent of the owner,

then you will find the defendant guilty of tampering in the first degree,

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, then you must find the defendant not guilty of that offense.

MAI-CR 23:21
Submitted by State

Filed JUN 5 1986
Freeman R. Bosley, Jr.
Clerk, Circuit Court

GIVEN
--Edward M. Peek--
Circuit Judge

ORIGINAL INDICTMENT

STATE OF MISSOURI-IN THE CIRCUIT COURT OF
ST. LOUIS COUNTY

STATE OF MISSOURI
-vs-
TERRY D. MCINTYRE
1548 PAPIN ST.
ST. LOUIS MO 63103

WARRANT # W44249
PD KIRKWOOD

REPORT NO. 85-14610

RACE BLACK D.O.B. 07/19/65
SEX MALE ALIASES
HT. 5 09
WT. 145 548230

DEFENDANT

CHARGE: STEALING A MOTOR VEHICLE - CLASS C FELONY

COMPLAINANT: DET. J. SCHNEEDLE
DATE WARRANT ISSUED: 12/05/85

WITNESSES:

PTN. CLIFFORD POPE
C/O KIRKWOOD P.D.
131 WEST MADISON
KIRKWOOD MO 63122
0420186 (314) 822-5858

DET. JACK SCHNEEDLE PH
C/O KIRKWOOD P.D.
131 W. MADISON
KIRKWOOD MO 63122
0480073 (314) 822-5858

DET. KEITH WANDLESS
C/O KIRKWOOD P.D.
131 W. MADISON
KIRKWOOD MO 63122
0480149 (314) 822-5858

LT. RUSSELL AUSTIN
C/O KIRKWOOD P.D.
131 W. MADISON
KIRKWOOD MO 63122
0480035 (314) 822-5858

PTN. LAWRENCE O'TOOLE PH
C/O ST. LOUIS CITY P.D.
1200 CLARK
ST. LOUIS MO 63103
1122202 (314) 444-5491

STEVEN M. GEORGE PH
C/O KIRKWOOD
MITSUBISHI
1040 N. KIRKWOOD RD.
ST. LOUIS MO 63122

JAKE NAUGHTON
C/O KIRKWOOD MITSUBISHI
1040 N. KIRKWOOD RD.
ST. LOUIS MO 63 122

STATE OF MISSOURI)
COUNTY OF ST. LOUIS) SS **INDICTMENT**

The Grand Jurors of the County of St. Louis, State of Missouri, charges that the defendant in violation of Section 570.030 R.S. MO. COMMITTED THE CLASS C FELONY OF STEALING A MOTOR VEHICLE, PUNISHABLE UPON CONVICTION UNDER SECTIONS 558.011.1(3) AND 560.011 R.S. MO. IN THAT, ON FRIDAY, NOVEMBER 22, 1985, AT KIRKWOOD, IN THE COUNTY OF ST. LOUIS, STATE OF MISSOURI, THE DEFENDANT APPROPRIATED A 1986 MITSUBISHI, A MOTOR VEHICLE, WHICH SAID PROPERTY WAS OWNED BY KIRKWOOD MITSUBISHI, AND DEFENDANT APPROPRIATED SUCH PROPERTY WITHOUT THE CONSENT OF KIRKWOOD MITSUBISHI, AND WITH THE PURPOSE TO DEPRIVE SAID OWNER THEREOF;

A TRUE BILL
-E— S. Dorsey-
Foreman

NO TRUE BILL
_____
Foreman

W-L-MC—
Pros. Atty.

--May-- Term, 19 86 As a condition of release, bond is set at $ 5,000.

--James R. Hartenbach
Circuit Judge,
St. Louis County

Instruction No. 7

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 22, 1985, in the County of St.Louis, State of Missouri, the defendant took a 1986 Mitsubishi automobile, property owned by Kirkwood Mitsubishi and

Second, that defendant did so without the consent of Kirkwood Mitsubishi, and

Third, that defendant did so for the purpose of withholding it from the owner permanently, and

Fourth, that the property taken was an automobile,

then you will find the defendant guilty of felony stealing.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

If you do find the defendant guilty of felony stealing, you will return a verdict finding him guilty of felony stealing.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these

propositions, then you must find the defendant not guilty of that offense.